TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 84

EDWARD M. FAY, WARDEN, ET AL., PETITIONERS,

vs.

CHARLES NOIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 22, 1963
CERTIORARI GRANTED MAY 14, 1963

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[fol. A] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

60-Civ.-482

UNITED STATES OF AMERICA, ex rel. CHARLES NOIA, Relator,

—against—

EDWARD M. FAY, as Warden of Greenhaven Prison, State of New York, Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS—
Filed February 4, 1960

To the Honorable United States District Court
For the Southern District of New York:

The petition of Maurice Edelbaum, respectfully shows:

1. That your petitioner is an attorney at law of the State of New York, is the attorney for Charles Noia, relator herein, and is fully familiar with all the facts and circumstances in connection herewith. That your petitioner makes application herein for a writ of habeas corpus for his client, Charles Noia, by reason of the fact that said Charles Noia is unlawfully detained and restrained of his liberty by the respondent, the Warden of Greenhaven Prison, Stormville, New York, the said prison being a penal institution under the jurisdiction of the Department of Correction of the State of New York.

2. The relator is now in the custody of the Warden of said Greenhaven Prison, Stormville, New York, which prison is in the territorial jurisdiction of this Court.

3. The cause or pretext of said detention and restraint [fol. B] is a certain judgment of conviction of the County Court of Kings County, dated March 2, 1942, wherein relator was convicted of the crime of Murder in the First

Degree and sentenced to life imprisonment pursuant to the jury's recommendation.

4. All remedies available to relator in the Courts of the State of New York, in which state the final order was rendered, have been completely exhausted and there is no further State corrective process or procedure available to relator within the contemplation of Title 28 United States Code Section 2254.

5. The said detention and restraint is unlawful and unconstitutional. The claimed basis for the relator's detention and restraint of liberty and the facts and circumstances which demonstrate that said detention and restraint are unlawful and unconstitutional are set forth hereinafter, as follows.

6. On February 16, 1941, one Murray Hammeroff was shot in front of his home at 1921 Stillwell Avenue, Borough of Brooklyn, in the City and State of New York. The said Murray Hammeroff died on February 18, 1941.

7. On Sunday, May 11, 1941 (almost three months later), relator, Charles Noia, and one Frank Bonino were taken into custody by the New York City Police Department. Later, on the same day, about 6 P.M., one Santo Caminito was also taken into custody.

8. Thereafter, upon information and belief, the following took place: Commencing about 9 P.M. in the evening of said day, Sunday, May 11, 1941, relator was continuously [fol. C] interrogated by five or six police officers. The questioning continued uninterrupted for five hours, until 3 A.M. the following morning, Monday, May 12th. The police then went home to bed. At that time relator had been interrogated continuously for six hours and had been in custody for over nine hours. No food had been given to him.

9. At that time, 3 A.M., Monday, May 12th, although not under arrest, relator was then locked in a cell in which there was no heat, no bed, no pillow and no blankets, but only a plain narrow board hanging from the wall of the cell. Relator could not and did not sleep. At 10 A.M.—and with-

out giving relator any food—the questioning was resumed. Detectives—singly or in groups—cursed, threatened, intimidated, and physically assaulted and abused him. For hours on end, they repeated over and over again their version of what had occurred on the night of the alleged murder, giving relator details of what they claimed had occurred. Again and again relator denied participation in the crime in any way. Still no food.

10. Relator asked to get in touch with his family. The detectives made a mockery of his request. He was struck by the detectives, hit on the side, and while one of the detectives held him by the hair, two of the other detectives punched and kicked him. He maintained his innocence.

11. Relator's family, in the meantime, tried to get in to see him in the station house, or to get information concerning his whereabouts. The police gave them false information.

[fol. D] 12. The questioning continued throughout the day on Monday, May 12th. When threats and physical abuse made no impression, the detectives begged, cajoled and feigned friendship. They promised to let him go home if he would confess. Still no confession. Still no food. They threatened to lock up his wife. Still no confession. Still no food.

13. During the day three detectives were brought in to face relator, one at a time. Each pretended to identify him as the person who was sitting at the wheel of the automobile at the time of the shooting. The identification, of course, was admittedly false, and was merely a desperate and amateurish attempt to induce a confession. In his opening to the jury the District Attorney explained this childish maneuver as follows: "The following morning the detectives decided something had to be done if they were going to get anywhere with this case. They thereafter sent to New York for two female detectives and another detective named Gavin, who they thought looked nothing like a detective, and these defendants were placed in a room and one by one these witnesses, alleged witnesses, were brought in, and they ostensibly identified these defendants

as perpetrators of the crime, although they were not actually witnesses to the crime."

Still no confession. Still no food.

14. The beatings, the promises, the cursing, the threats continued. The detectives went out to eat several times. Relator asked for food. They refused it to him.

The same evening, detectives told relator to talk to [fol. E] Santo Caminito, one of the co-defendants. He did so. Caminito told relator that he too had been beaten, threatened and abused. He told relator that he was thrown against a wall, punched in the back and slapped in the face, and that he too had no food for a period of 29 hours or more. Relator told Caminito that they should have a lawyer. They then agreed to tell the story which the police had been pounding into them continuously. Relator felt that this would provide his best opportunity for relief from further prosecution and give him a chance to establish his innocence.

15. Accordingly, about midnight that night, Monday, May 12th, relator confessed. He repeated the version of the occurrence which had been hammered into him over and over by the detectives. He was then fed. It was the first food he had been given in 30 hours.

16. Another statement was given to an assistant district attorney the same night.

17. Thereafter, about 2:30 or 3 A.M. the next morning, Tuesday, May 13th, relator was arrested for the crime of murder. Much later that same day, relator was finally arraigned before a Magistrate. *This was more than 40 hours after having first been taken into custody.*

18. No evidence was offered on the trial other than the confessions thus illegally procured. The confessions, on the trial, were repudiated.

19. Relator, as well as the co-defendants, was convicted and sentenced to life imprisonment at hard labor.

20. The co-defendants Caminito and Bonino appealed [fol. F] to the Appellate Division, Supreme Court, Second

Judicial Department, and the judgment was affirmed by said Court (265 App. Div. 969), and upon appeal to the New York State Court of Appeals, the judgment was again affirmed (291 N.Y. 541). *Petitioner failed to appeal.*

21. Co-defendant Caminito thereafter made two motions for reargument, which were denied by the Court of Appeals (297 N.Y. 882; 307 N.Y. 686). The co-defendant Caminito then petitioned the Supreme Court of the United States for certiorari, and his petition was denied with Justices Black and Douglas dissenting (348 U.S. 839). Some years later, the co-defendant Caminito moved by order to show cause for a writ of habeas corpus before the United States District Court for the Northern District of New York (Foley, J.) on the ground that confessions introduced at the trial as to each defendant were coerced. Said petition was dismissed with opinion (127 F. Supp. 689).

The said Court thereafter, upon application, granted a Certificate of Probable Cause for Appeal. An appeal was taken to the United States Court of Appeals for the Second Circuit, which unanimously reversed the District Court and sustained the writ of habeas corpus (222 F.2d 698).

Thereafter, the defendant Bonino moved in the Court of Appeals for reargument of the judgment of affirmance, and said motion was granted on January 5, 1956 (309 N.Y. 930). On April 27, 1956, upon said reargument, the Court reversed the judgment of conviction and ordered a new trial, with the following memorandum:

> "Since the United States Court of Appeals, Second Circuit, has held that the writ of habeas corpus must [fol. G] issue to his co-defendant, Caminito because his confession was inadmissible, the defendant Bonino should, in the interests of justice, receive a new trial with his (Bonino's) confessions excluded." (1 N.Y. 2d 752).

The order affecting petitioner Noia is dated June 25, 1956 and vacates the judgment of conviction rendered against him on March 12, 1942 wherein he was sentenced to natural life upon his conviction for the crime of murder in the first degree. Said order directed that he be returned

from Auburn State Prison to the custody of the Commissioner of Correction of the City of New York to await a new trial. Thereafter, a motion was made for bail and petitioner was continued in $25,000. bail. The District Attorney appealed from said order to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and on the 17th day of June, 1957, said order was unanimously reversed. Hon. Stanley F. Fuld, Associate Judge of this Court, on June 24, 1957, granted a Certificate certifying that there is a question of law involved which ought to be reviewed by the Court of Appeals. Said Judge also granted a Certificate of Reasonable Doubt, and continued the petitioner in bail in the sum of $25,000, the amount which Hon. George J. Joyce, County Judge, had fixed at the time he vacated and set aside the judgment of conviction on June 25, 1957. On January 23, 1958, the Court of Appeals of the State of New York rendered a decision unanimously affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which order reversed the order made by Hon. George J. Joyce, County Judge of Kings County, dated June 26, 1956. A copy of the opinion of the Court of Appeals of the State of New York is attached hereto and made a part hereof. Petition for certiorari to the United [fol. H] States Supreme Court was denied on June 9, 1958.

The present application constitutes the only available remedy open to relator to test the question as to whether his fundamental rights under the Constitution of the United States have been invaded. A substantial Federal question is presented which requires review by this Court.

22. The only issue presented on this application is whether, under the guarantees afforded to relator by the Fourteenth Amendment to the Constitution of the United States, relator was and is being deprived of his liberty without due process of law.

23. By reason of the facts and circumstances heretofore recited, relator contends that he is deprived of his liberty without due process of law because his conviction resulted from the use of a confession not voluntarily made, but, on the contrary, forced out of him through duress, abuse,

trickery, insults, threats, assaults and physical violence, and because relator was deprived of his right to an arraignment held promptly after his apprehension by police authorities, i.e.:

(a) A period of 33 hours elapsed between relator's apprehension and arrest.

(b) A period of more than 40 hours elapsed between relator's apprehension and arraignment.

(c) During the said entire period of time, relator was held incommunicado; he was denied the right to communicate with his family; his family was denied [fol. 1] the right to see him or to know where he was being kept.

(d) During the entire period of time relator was prevented from procuring legal advice.

(e) Relator was compelled to respond to constant interrogation—without food—until he confessed—30 hours after being taken into custody.

(f) Relator was denied food and medical care although he requested same.

(g) Relator was beaten, pushed, punched and slapped.

(h) Relator was cursed.

(i) Relator was insulted and otherwise abused.

(j) The false promise was made that relator would be sent home if he confessed.

(k) Relator was threatened with the arrest of his wife.

(l) Relator was threatened with further physical violence unless he confessed.

(m) An attempt to trick and entrap relator was made through deliberately false identifications.

(n) Relator was detained overnight in a cold cell without heat, covering or a place to sleep.

24. The relator has continuously asserted his innocence of the crime for which he has been convicted. It is relator's further contention that due process was also violated here by the failure of the courts of the State of New York to vacate the judgment of conviction herein; that the failure of the courts of the State of New York to provide a remedy where a defendant has failed to appeal and under circumstances where it has later been judicially determined that [fol. J] due process was violated in obtaining the judgment against co-defendants in the exact same status as relator, is a violation of due process as to relator.

25. So that all of the facts heretofore asserted may be before the Court on this application, the record on appeal to the New York Court of Appeals containing verification of all the aforesaid statements is hereby made a part of this petition with the same force and effect as if fully incorporated herein. A copy of said record will be submitted to the Court.

26. In order that further facts in behalf of the relator on this application may be presented to the Court, it is respectfully urged that the Court set a date for hearing.

27. No other application for this relief has heretofore been made to any other Court or Judge.

Wherefore, petitioner prays that a writ of habeas corpus issue herein directed to the said Edward M. Fay, as Warden of Greenhaven Prison, Stormville, New York, commanding him to produce the body of the relator, Charles Noia, before this Court at a time and place to be specified in said writ, to the end that this Court may inquire into the cause of the relator's detention, and that the relator be ordered discharged from the detention and restraint aforesaid.

Maurice Edelbaum, Petitioner.

Dated: New York, N.Y., February 4th, 1960.

[fol. K] *Duly sworn to by Maurice Edelbaum, jurat omitted in printing.*

[fol. L]

EXHIBIT A TO PETITION

STATE OF NEW YORK

COURT OF APPEALS

No. 280

THE PEOPLE &c.,

Respondent,

vs.

SANTO CAMINITO,

Appellant.

THE PEOPLE &c.,

Respondent,

vs.

CHARLES NOIA,

Appellant.

OPINION

FULD *J.*:

Concerned though we are with appeals in two separate cases, one involving Santo Caminito, the other, Charles Noia, we treat them together since they stem from the same prosecution and involve facts common to both.

Caminito, Noia and Frank Bonino were indicted in 1942 for the murder of one Hameroff. At the trial, the only evidence of guilt consisted of confessions signed by each defendant in which he acknowledged participation in an [fol. M] attempted robbery of Hameroff terminating in his fatal shooting. Concluding that the confessions were not coerced, as the defendants contended, and that their contents were true, the jury found the three defendants guilty of felony murder and the trial judge, upon the jury's recommendation, sentenced each to life imprisonment. Only Caminito and Bonino appealed and their judgments of con-

viction were affirmed (265 App. Div. 960; 291 N. Y. 541, rearg. den. 297 N. Y. 822; cert. den. (as to Bonino) 333 U. S. 849, (as to Caminito) 348 U. S. 839). Some years later, Caminito sought redress in the federal courts by way of habeas corpus; the United States Court of Appeals for the Second Circuit, reversing the District Court, sustained the writ on the ground that it appeared, upon the facts "not disputed," that Caminito's confessions had been coerced. (See *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, 699-700, revg. 127 F. Supp. 689, cert. den. 350 U. S. 896). Following this determination, Caminito was remanded (by order of the District Court) to the Kings County Court "for such other and further proceedings as justice may require upon the indictment against him * * * for the crime of murder in the first degree" and, some short time later, Caminito, urging that the evidence before the grand jury was insufficient, moved to set aside the indictment. The County Court granted the motion, but the Appellate Division reversed.

The fact that a judgment of conviction has been reversed and a new trial ordered does not mean that there *must* be a new trial. The defendant possesses a right to challenge the indictment because of an asserted lack of evidence [fol. N] before the grand jury even after reversal and the grant of a new trial. (See, e.g., *People* v. *Mullens*, 298 N. Y. 606; *People* v. *Nitzberg*, 289 N. Y. 523, 530-531). Such a reversal does not, however, give the defendant any greater right than that which he had before the first trial. In other words, he may have the indictment set aside only if on its face the record before the grand jury reveals that the evidence did not spell out a *prima facie* case of guilt. (See, e.g., *People* v. *Donahue*, 309 N. Y. 6, 7; *People* v. *Sweeney*, 213 N. Y. 37, 44, 45-46.) As we recently wrote in the *Donahue* case (*supra*, 309 N. Y. 6, 7), any defense which a defendant may have, any taint that a defendant may be able to show with respect to evidence adduced, not apparent in the grand jury minutes, "must be offered at the trial for the appraisal and decision of the (trial) jury. A court has no alternative but to deny a motion to set aside an indictment on the ground that there was insufficient evidence before the grand jury, when that body has

acted upon, evidence sufficient, 'if unexplained or uncontradicted' (Code Crim. Pro., Sec. 258 (renumbered Sec. 251)), to warrant a conviction by the trial jury."

In the case before us, the evidence presented to the grand jury—testimony of confessions by the defendant and proof of the *corpus delicti*—was unquestionably sufficient to warrant a conviction of murder in the first degree by the trial jury. That being so, the indictment is immune from attack on a motion such as here made, and the Appellate Division correctly decided that Caminito's application should be denied.

That, of course, disposes of Caminito's appeal, but we add this further word in view of the district attorney's [fol. 6] contention that the People are privileged to introduce his confessions into evidence upon a retrial. In sustaining Caminito's writ of habeas corpus, the United States Court of Appeals held the confessions coerced on the basis of facts "not disputed" (222 F. 2d 638, 699-700). It is virtually impossible to perceive how, upon a new trial, evidence could justify their admission. Accordingly, when on reargument granted to Bonino, this court, solely on the strength of the federal court's determination as to Caminito, reversed Bonino's conviction and directed that there be a new trial, we explicitly declared that the new trial was to proceed "with his (Bonino's) confessions excluded" (1 N. Y. 2d 752, 753). The same, of course, applies to Caminito's.

With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him.

As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his fail-

ure to appeal from the judgment, the trial court has "inherent power" to set aside its own judgment procured in violation of constitutional right.

[fol. P] Not having participated in the appeals prosecuted by his co-defendants, Noia is not entitled to the beneficial results that they obtained. Some years ago, we held that the nonappealing co-defendants of one whose conviction was reversed on appeal have "no remedy * * * through the court"; the judgments recorded against them "stand" and "they must serve their sentences." (*People* v. *Rizzo*, 246 N. Y. 334, 339.) Their only recourse, the court observed, was to the Governor for executive clemency.

Nor does the revitalization of *coram nobis* in this state since 1943 (see *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed and considered, as did his co-defendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error *coram nobis*. (See, e.g., *People* v. *Sullivan*, 3 N. Y. 2d 196, 198.) And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (See *Davis* v. *United States*, 121 F. 2d 594, 596, cert. den. 353 U. S. 960; *Howell* v. *United States*, 172 F. 2d 213, 215, cert. den. 337 U. S. 906.) While the scope of *coram nobis* has been somewhat expanded beyond its original office (see, e.g., *People* v. *Shaw*, 1 N. Y. 2d 30; *People* v. *Kronick*, 308 N. Y. 866), [fol. Q] it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously is not such a case.

The order of the Appellate Division should be affirmed in each case.

FROESSEL, *J.*:

I agree for affirmances in both cases. I do not agree, however, that we have the right to say, as to Caminito's confessions, that it is "virtually impossible to perceive how, upon a new trial, evidence could justify their admission". If substantially the same evidence surrounding the confessions is adduced on a retrial, those confessions must of course be excluded (see *People* v. *Bonino*, 1 N. Y. 2d 752). If, however, upon another trial, it can be demonstrated by new or additional evidence that the confessions were not coerced, or that a question of fact as to coercion is reasonably and fairly presented, the People may not be precluded from reoffering them.

* * * * *

In *People, &c.*, v. *Caminito*: Order affirmed. Opinion by Fuld, *J.* All concur except Froessel, *J.*, who concurs in result only in a separate opinion in which Dye and Burke, *JJ.*, concur.

In *People, &c.*, v. *Noia*: Order affirmed. Opinion by Fuld, *J.* All concur.

[fol. R] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civil 482

[Title omitted]

AFFIDAVIT IN OPPOSITION Filed March 15, 1960

State of New York,
County of Kings, ss.:

William I. Siegel being duly sworn, deposes and says:

I am an Assistant District Attorney on the staff of the District Attorney of Kings County.

I make this affidavit in opposition to a petition for the issuance of a writ of habeas corpus initiated by an

order to show cause granted by Hon. Sidney Sugarman, United States District Judge, on February 5, 1960. A recital of the history of the case clearly discloses the lack of merit in the petition.

Relator was jointly indicted and tried with Santo Caminto and Frank Bonino in the County Court of Kings County for the crime of Murder in the First Degree in the shooting and killing of one, Murray Hammeroff during the commission of a robbery. Their conviction by the jury was followed by a recommendation that they be imprisoned for their respective natural lives and the Court, accepting the recommendation, so sentenced them by a judgment dated March 2, 1942.

On the trial, the Court instructed the jury that the sole evidence against the defendants was the confession of each of his participation in the robbery, and that petitioner's confession included the further fact that it was he who had been the actual killer. As to petitioner, the [fol. 8] Court submitted the question of his guilt to the jury on both the common law and felony murder theories. At the trial, the defendants testified that all of the confessions were voluntary and had been wrung from each by police brutality and illegal delay in arraignment. It is obvious from the fact that the jury's recommendation for mercy included petitioner that he was convicted on the felony murder theory.

Caminito and Bonino appealed to the Appellate Division of the Supreme Court, Second Judicial Department, which Court affirmed the judgment (265 App. Div. 960) and upon appeal to the New York State Court of Appeals, the judgment was again affirmed (291 N.Y. 541).

In all these appellate proceedings, the major contention on behalf of both Caminito and Bonino related to the alleged involuntary nature of the confessions.

Caminito thereafter made two motions for reargument which were denied by the Court of Appeals (297 N.Y. 882; 307 N.Y. 686). His subsequent petition to the United States Supreme Court for certiorari was denied (Black and Douglas, JJ. dissenting, 348 U.S. 839). Caminito then petitioned for a writ of habeas corpus identical with the pro-

ceeding now before this Court upon the same ground of coerced confession. The petition was dismissed in the United States District Court for the Northern District of New York (Foley, J., 127 F.Supp. 689). However, upon the appeal to the United States Court of Appeals for the Second Circuit, allowed by Foley, J., the District Court was unanimously reversed and the writ of habeas corpus was sustained (228 F.2d 698). The application by the State of New York for certiorari was denied by the United States Supreme Court (350 U.S. 896).

[fol. 7] Bonino thereafter moved in the New York Court of Appeals for reargument of its judgment of affirmance and the motion was granted (309 N.Y. 960). Upon reargument, that Court reversed the judgment of conviction and ordered a new trial (1 N.Y. 2d 752).

The Supreme Court's denial of certiorari upon the petition of the State of New York was followed by an order made in the Kings County Court dismissing the indictment against Caminito and vacating the judgment against petitioner Noia even though he did not appeal from the original judgment of conviction.

Petitioner's failure so to appeal is crucial to the determination of the petition at bar. Indeed, no legal process with respect to him eventuated until after the Court of Appeals had granted Bonino's motion for reargument, reversed the original judgment of conviction as to him and ordered a new trial. The People appealed from both orders in a consolidated appeal and the Appellate Division reversed the orders with the effect of reinstating the indictment against Caminito and the judgment against petitioner Noia (4 App. Div. 2d 697, 698). The Court of Appeals affirmed the action of the Appellate Division (3 N.Y. 2d 596).

It is pertinent here to quote from the opinion of Fuld, J. writing on behalf of a unanimous Court:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him.

As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same [fol. 6] position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has 'inherent power' to set aside its own judgment procured in violation of constitutional right.

Not having participated in the appeals prosecuted by his codefendants, Noia is not entitled to the beneficial results that they obtained. Some years ago, we held that the nonappealing codefendants of one whose conviction was reversed on appeal have 'no remedy • • • through the court'; the judgments recorded against them 'stand' and 'they must serve their sentences.' (People v. Rizzo, 246 N.Y. 334, 339). Their only recourse, the court observed, was to the Governor for executive clemency.

Nor does the revitalization of coram nobis in this state since 1943 (see Matter of Lyons v. Goldstein, 290 N.Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed, as did his codefendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error coram nobis (see, e.g., People v.

Sullivan, 3 N.Y. 2d 196, 198). And this is so even through the asserted error or irregularity relates to a violation of constitutional right." (See Davis v. United States, 214 F. 2d 594, 596 cert. denied 353 U.S. 960; Howell v. United States, 172 F. 2d 213, 215, cert. denied 337 U.S. 906). While the scope of coram nobis has been somewhat expended beyond its original office (see, e.g. People v. Shaw, 1 N.Y. 2d 30; People v. Kronick, 308 N.Y. 866), it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously, is not such a case."

Petitioner then sought certiorari from the Supreme Court of the United States, but on June 9, 1958, the writ was denied (357 U.S. 905).

The instant petition followed. It is based upon allegations of police brutality, deprivation of opportunity to consult with family and illegal delay in arraignment and contains the pious declaration that upon such facts "the [fol. V] present application constitutes the only available remedy open to relator to test the question as to whether his fundamental rights under the Constitution of the United States have been invaded. A substantial Federal question is presented which requires review by this Court."

This assertion follows an earlier claim in the petition that "all remedies available to relator in the Courts of the State of New York, in which State the final order was rendered, have been completely exhausted and there is no further State corrective process or procedure available to relator within the contemplation of Title 28, U. S. Code, Sec. 2254."

That the latter quoted assertion concerning the exhaustion of available remedies in the Courts of the State of New York is inaccurate as a matter of law is demonstrated beyond the necessity of further argument by Judge Fuld's opinion herein previously quoted from to the effect that petitioner could not in the State Court at his option substitute for the orderly and required procedure of appellate

review the quite dissimilar and "extraordinary writ of error coram nobis."

It is equally clear that the Federal writ of habeas corpus is unavailable to petitioner. The jurisdiction of this Court to consider and in the proper case to grant a petition for a writ of habeas corpus arises under 28 U.S.C. Sec. 2254, which provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> [fol. W] An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

This rule has been uniformly applied and insisted upon by the Federal Courts. In *Brown* v. *Allen*, 97 L.Ed. 469, 504, 344 U.S. 443, 487, the Supreme Court wrote:

> "We have interpreted Sec. 2254 as not requiring repetitious applications to state courts for collateral relief, p. 413, supra, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus."

Accord: *Ex Parte Hawk*, 321 U.S. 114, 116, 88 L.Ed. 572, 574; *Darr* v. *Burford*, 339 U.S. 200, 94 L.Ed. 761; *Wade* v. *Mayo*, 334 U.S. 672, 92 L.Ed. 1647.

In *Wade*, Reed, J. wrote, in words prophetic and dispositive of this case:

"An accused should not be permitted to reserve proceedings for a habeas corpus petition in federal courts which would have furnished a basis for a review in regular course in the State court; not even when those grounds are that the accused was denied a constitutional right by a State court subject to reversal by a higher State court (citing cases). To permit such trifling with State criminal law would disrupt its efficient administration. The federal court's refusal of consideration depends on the rule that the federal courts should not utilize habeas corpus to take the place of state remedies except in extraordinary situations where otherwise the accused would be 'remediless'. It is not seemly that years after a conviction, when time has dulled memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of any claim of unfairness in their trial, should be permitted to attack their sentences collaterally by habeas corpus because of errors known to them at the time of trial. When it is shown by the record that a petitioner in a federal court for relief from a State conviction that involves a denial of constitutional rights [fol. X] has without adequate excuse failed to use an available state judicial remedy, although all such remedies are barred to him by limitation, I think that federal courts should not intervene to correct the error. . . . The principle that federal constitutional questions must be properly raised in state courts before they will be considered by this Court is too well established to require citation."

It would be a work of supererogation further to labor the point of jurisdiction of this Court. It is similarly of no service to this Court to engage upon a discussion of the facts of the case as disclosed by the record of the trial. If, as we respectfully submit is the case, this Court is without power to entertain the petition by reason of the very limitations of the Enabling Act, U.S.C.A. Title 28, Sec. 2254, then no good purpose is served and indeed the time of the Court would be wasted by our review of the

facts. We stand ready at all times, however, to submit to the Court the record of the trial and the various briefs in the case and any further material or word upon the subject which the Court, in its opinion, may deem to be helpful to it.

It is therefore respectfully submitted that the petition for a writ of habeas corpus should be denied.

William I. Siegel

Sworn to before me this 10th day of February, 1960.

Aaron Nussbaum, Notary Public, State of New York, No. 24-2918625, Qualified in Kings County, Commission Expires March 30, 19 .

[fol. Y] [File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 482

UNITED STATES OF AMERICA ex rel. CHARLES NOIA, Petitioner,

vs.

EDWARD M. FAY, as Warden of Greenhaven Prison, State of New York, Respondent.

Transcript of Hearing—March 8, 1960

Before: Hon. John M. Cashin, District Judge.

New York, New York

APPEARANCES:

Maurice Edelbaum, Esq., Attorney for Petitioner.

Edward S. Silver, Esq., District Attorney, Kings County, appearing for the Respondent; By William I. Siegel, Esq., Assistant District Attorney.

[fol. 2]

STATEMENT OF HISTORY OF CASE AND ARGUMENT BY MR. EDELBAUM

Mr. Edelbaum: This application is on a writ of habeas corpus addressed to The Warden of Greenhaven State Prison at Stormville, New York.

I want to give you a little history before I go into it. The basis for the writ of habeas corpus that we have asked for is to vacate a judgment of conviction for murder in the first degree some eighteen or nineteen years ago, wherein the defendant or the relator was sentenced to natural life upon recommendation by the jury.

In the State of New York in a felony murder case the jury may recommend natural life, which the judge may or may not accept. In this case the late Judge Brancato did accept it.

The defendant Noia, together with two other men, Santo Caminito and Frank Bonino were tried in the County Court of Kings County sometime in the year 1942. The sole evidence against them at that time was an alleged confession obtained from all three defendants. There was not a scintilla of evidence outside of the confession and the corpus delicti to link these three men with the commission of the crime.

Under the laws of the State of New York a confession plus a corpus delicti is sufficient to convict a man for the [fol. 3] crime. All three were sentenced to natural life. Two of the defendants appealed to the Appellate Division, namely, Bonino and Caminito, Noia did not appeal.

The Appellate Division confirmed both Bonino and Caminito without opinion. The Court of Appeals to which an appeal was prosecuted also affirmed without opinion as to both defendants.

Some fourteen years later I was retained to represent the defendant Caminito by his family, and I read the record, of which I have a copy before me, and I became convinced that due process was violated in the manner in which the confession was extorted, and being aware of the cases which hold, and this is going to hit me in the face as to this application, as I go on, being aware that a

defendant in a state court proceeding before proceeding into the federal court had to exhaust the state remedies. I discovered that no application for certiorari to the Supreme Court of the United States had been made by Caminito. That is one of the remedies which is called a state remedy, the exhaustion of the state remedy.

I made application to the State Court of Appeals after discovering that there was no limitation in time, for rear- [fol. 4] gument. I made application for reargument fourteen years after the affirmance in the Court of Appeals, and the court denied my application.

Within ninety days I petitioned the Supreme Court of the United States for certiorari. Mr. Siegel who was my adversary in that case opposed it on the ground that I was trying to revive time. However, the Supreme Court did not dismiss my opinion. They denied it and they did something which is rarely done. They published a dissent made by two of the justices, namely, Justice Black and Justice Douglas.

I then instituted the same proceeding for Caminito in the Northern District of New York because of the fact that Caminito at that time was in Auburn State Prison. I argued that before Judge Foley, who is from Albany. Judge Foley gave us great consideration. We argued it at great length. He read this record and in his opinion which was filed he denied the application for the writ and he said that while he was troubled about the record, the way this confession was extorted, and I will come to that later, in effect he said that as a district judge it was not incumbent upon him to upset the great Court of Appeals of the State of New York, or some such words; I am just paraphrasing his language.

[fol. 5] However, he gave me a certificate of probable cause, and I prosecuted an appeal to the United States Court of Appeals in this district. The matter was argued by me before Judge Frank and Judge Clark and Judge Hastie, who was sitting from the Third Circuit, and that court unanimously reversed Judge Foley, vacated and set aside the judgment of conviction rendered against Caminito in the state court and remitted the matter back to the

County Court of Kings County for such procedure as would be necessary under the indictment.

I am just going to quote one phrase of Judge Frank in his opinion. He said that a confession obtained by these loathsome means is no more valid than if it was forged. Caminito was released on bail, although it was a capital case, and Mr. Siegel thereupon petitioned the United States Supreme Court for certiorari from the decision of the United States Court of Appeals, and the Supreme Court this time, without any published dissent, denied certiorari.

So Caminito was free. The District Attorney concedes that they have no other evidence other than the corpus delicti to sustain any conviction, and he has never been put to trial.

Now Bonino, whom I did not represent, made a motion [fol. 6] in the State Court of Appeals, based upon the Caminito decision for reargument, and by a vote of four judges to three judges, the Court of Appeals reversed the conviction of Bonino and ordered a new trial.

I was then retained by Noia, who never appealed. I made a motion in the County Court of Kings County, addressed to the inherent power of the court to vacate that judgment and conviction, on the ground that in the interest of justice, since it had now been clearly established and adjudicated by a federal court that due process was violated in the obtaining of the conviction of these three men, that the court, in the interest of justice, should vacate his conviction because it would be inhuman to have that man serve out a life sentence when the two companions who were convicted on the exact same circumstances and whose confessions were obtained under the exact same manner to be free.

Judge Joyce in an opinion said that "Noia did not, at any time seek appellate review anywhere of the judgment of conviction upon this indictment. The question this arises whether or not he must serve out a life sentence imposed on what is now determined to have been a manifestly [fol. 7] unlawful conviction, merely because he did not so appeal. In such a situation should not common decency and substantial justice require the court, such as the county court on its own motion, to rectify an injustice, and aside.

from the question of his guilt or innocence guarantee to Noia even at this late date a free and legal and American trial.

"In other words, is it ever too late to extend justice to an accused?"

Then he went on to say that "This court is convinced that it would be a travesty of justice to withhold from petitioner the relief he seeks in view of the tainted antecedents of the conviction entered against him. To withhold the relief because of the procedural technicality would compound the injustice and on any conception of constitutional law it would be unthinkable to condemn petitioner to serve out a life sentence on the palpable illegal conviction and to be foreclosed to the only available avenue of judicial review."

He vacated and satisfied the conviction. Noia was released also on bail, and he came out of Auburn Prison. I think he was at liberty for a little over a year, almost two years, during which time he married, begot a child.

[fol. 8] In the meantime, the District Attorney of Kings County appealed to the Appellate Division, which reversed Judge Joyce.

Then I carried it to the Court of Appeals and they confirmed the reversal of the Judicial Division. I then petitioned the Supreme Court of the United States for certiorari from that judgment, and that was denied.

I now come in here on the whole writ of habeas corpus to right what I say is an absolute injustice for this man to have to spend the rest of his life in prison, where a United States court has held that confessions obtained in this case were obtained in violation of due process.

Now, your Honor, I am aware that Section 2254, pursuant to the judgment of the state courts shall not be granted unless it appears that the applicant has exhausted all remedies available in the courts of the state. Then it goes on to say, and this is where I say that this court could find room to right an injustice, "or if there is either the absence of available state corrective process, or the existence of circumstances rendering such process ineffective."

[fol. 9] Now, Judge Fuld, in writing for the court in reversing Judge Joyce in this opinion said something which to me appears to be significant:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him.
>
> "As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor"—and this is what is significant to me—"nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts."

Let me tell you about the facts in this case, your Honor.

On February 16, 1941, one Murray Hammeroff was shot in front of his home at 1921 Stillwell Avenue, in Brooklyn. He died some two days later.

On Sunday, May 11, 1941, some three months later, the relator, Charles Noia, and Bonino and Caminito were taken into custody.

They were questioned all that night.

Now we have a section of law in the New York Criminal [fol. 10] Code that requires the prosecuting people to promptly arraign and accuse. There was a felony court open that Sunday night. They were not arraigned in the felony court or charged with any crime.

They were questioned all day, and they were beaten, according to the testimony of all three men, by the police. They were kept in seclusion and an attorney tried to reach them, and was informed that they did not know where these men were, and he was denied to them.

As the assistant district attorney said at the time he tried this case in opening to the jury, sometime on Monday afternoon, after they had been in custody for more than 24 hours, after they had no place to sleep and after they had had no food, and after they were continually questioned by relays of detectives, as found by this Court of Appeals in this district, the district attorney in his opening to the jury said the police found they were not getting anywhere, so they decided to do something about it. And what did they do about it?

They sent over to New York for two female detectives and a detective from the pickpocket squad, who came over to the station house in Brooklyn. These three individuals [fol. 11] pretended that they were eyewitnesses to the crime, in the presence of these three men, and they described what the three men had done.

There came a time when Noia said to Bonino, "We are not going to get anywhere, the way we are being beaten, the way everything is going on here, we might as well tell them a story, tell them anything, and then we will see a lawyer and we can repudiate it." And they made confessions, which have been held to be void. There is not a scintilla of evidence outside of the confessions.

Your Honor, I have gone into great detail in my petition, the manner in which these confessions were extorted, and which was so found as a fact by the Court of Appeals of this court.

Now I am met with this argument, which you will be met with, that Noia could have appealed, and because he didn't appeal he has not exhausted the state remedies, and therefore he has no standing in this court.

I say to your Honor that we have exhausted the only remedy available to us. We have made application to the County Court to correct an injustice, a conviction which was obtained, not concededly, in violation of due process. We have prosecuted that conviction up to the Supreme Court [fol. 12] of the United States. I say that now we are properly before a federal court, which is the only court available to us to correct this injustice. To be met with an argument that may be perhaps the remedy that this man has is for executive clemency to the Governor of the State of New York, is no argument because, first of all, there is no assurance that such application would be granted. Secondly, even if it is granted, it does not under the law of our state, vacate the judgment of conviction. It does not wipe out the conviction. It remains as a conviction, even though his sentence may be commuted and he may be released under the laws of the State of New York.

Your Honor, to me it appears that wherever there is an injustice, wherever it has been established that there has been an injustice, that there must be a remedy to correct

such injustice, and it seems to me unthinkable that two men exactly in the same position as he is, should be free, should be walking the streets, when this man is obliged to serve out a life sentence, merely because he did not appear.

Now there is going to be all kinds of speculation as to why he did not appeal. It seems to me that the most obvious reason why he did not appeal is because he did not have [fol. 13] the money to appeal.

Now, your Honor, we are here in court, and I say to you that you have this power to vacate this judgment because under the old common law of writ, where there has been a want of jurisdiction and where a man is convicted in violation of due process of law of our Constitution, that is what has been held with the two co-defendants. I say that the County Court of Kings County never had jurisdiction over this man. This court has the power to vacate and set aside that judgment of conviction.

The Court: I do not agree with you that they did not have jurisdiction.

Mr. Edelbaum: I say they did not have jurisdiction in the matter in which this conviction was obtained. They originally had jurisdiction to try him, but once having tried him in violation of due process, there was no jurisdiction under those circumstances. That is what I am talking about.

The Court: All right.

STATEMENT BY MR. SIEGEL

Mr. Siegel: May it please the Court, I am, of course, speaking figuratively when I say that as my distinguished friend was arguing, I tried to look over here to my right and expected to see a jury of twelve citizens. I was agree- [fol. 14] ably disappointed when I saw the benign countenance of your attache sitting there, because all of these recitals concerning the facts of the procurement of the confession, I submit are absolutely irrelevant on the argument of this motion of this petition. What your Honor has before you I submit is nothing but a pure question of law. It is a question of law based upon the facts which neither

the quantity or the quality of Mr. Edelbaum's arguments can change or make vanish into thin air. The fact is, and it is the central fact of jurisdiction for this court now, that Noia did not appeal to the highest court of this state from the judgment of conviction.

Section 2254 of 28 United States Code provides in haec verba, an application for a writ of habeas corpus on behalf of a person in custody, pursuant to a judgment of the state court, shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state. I submit that it is futile for Mr. Edelbaum to attempt to substitute in lieu of an appeal from the judgment a subsequent appeal from a coram nobis order, or an order denying the coram nobis motion which he never had a right to make.

[fol. 15] It is the law of the State of New York, just as I believe it is the law under the federal codified coram nobis law, that coram nobis lies only exclusively to test out a question which exists de hors of the record. If it is a fact and if it is based on an alleged fact or even a true fact, as the case may be, of which there once had been a record, so that the error could be tested out on appeal, coram nobis will not lie. Mr. Edelbaum knows that. He and I have been in the Court of Appeals in the famous Loriglia case. We were in the Supreme Court of the United States in the famous Canesio case. He knows the law coram nobis in New York, may I say with all due modesty, as well as I do, and I have had my share in the last seventeen years in making the law of coram nobis in New York. He knows that you cannot bring a coram nobis motion to test out a question which should have been testified out on appeal. Therefore it is a complete misreading of Section 2254 of the Federal Code to equate the subsequent appeal from orders, with the appeal which he failed to take from the original judgment.

The Court: Let me interrupt you here.

Mr. Siegel: Yes, sir.

The Court: Do you stand here and tell me that because [fol. 16] this man did not take an appeal the Court is powerless to do anything about it?

Mr. Siegel: Absolutely.

The Court: That is a situation where our Court of Appeals said that this confession was unconstitutionally obtained.

Mr. Siegel: I say that with the greatest deference to your Honor personally, and I say that you are bound by the very statute which gives you jurisdiction.

The Court: I do not agree right now with you. You may be able to convince me, but so far I cannot go along with you on that.

Mr. Siegel: Let me try to convince you, your Honor. I say the statute which gives you jurisdiction to entertain the petition, tells you that you shall not—

The Court: Do you mean to say then that this particular man is powerless to do anything because he did not take an appeal from the conviction?

Mr. Siegel: In a nutshell, yes. And while it may shock Mr. Edelbaum's sense of equity, the Court of Appeals of the State of New York was not shocked by it.

[fol. 17] We had a very famous case, People v. Rizzo, where two or more—I think to be exact—three men were convicted of a crime in the County Court or General Sessions. Two of them appealed and one of them didn't. At least one of them did not appeal. The Court of Appeals reversed the conviction as to those who did appeal, and then pointed to the fact which they said was anomalous, as he says now, it is anomalous that co-defendants convicted on the same evidence, some must go free and one must serve. The Court of Appeals recommended to the district attorney of Bronx County that the matter be called to the attorney of the Governor, the then Governor. The Court said that "We are powerless to do anything about it," and the Court of Appeals is not shocked by any lack of equity because equity, after all, exists according to the rules of law, and I do not believe that Mr. Edelbaum should be shocked by it. At any rate it is a strict question of law which I am submitting to your Honor, and it is not my interpretation of it. The Supreme Court of the United States has laid down in Brown v. Allen, 344 U.S. 443, 487, and that is in accord with prior cases on the subject, Ex Parte Hawk, 321 U.S. 114; Darr v. Burford, 339 U.S. 200; and Wade v. Mayo, 334 U.S. 672.

[fol. 18] And I would like to take a moment to read what Mr. Justice Reed wrote in the Wade case, which appears to me to be prophetic as well as dispositive of the case now before you:

> "An accused should not be permitted to reserve proceedings for a habeas corpus petition in federal courts which would have furnished a basis for a review in regular course in the state court; not even when those grounds are that the accused was denied a constitutional right by a state court subject to reversal by a higher state court (citing cases.) To permit such trifling with state criminal law would disrupt its efficient administration. The federal court's refusal of consideration depends on the rule that the federal courts should not utilize habeas corpus to take the place of state remedies except in extraordinary situations where otherwise the accused would be 'remediless'."

The Court: Why isn't this that kind of case?

Mr. Siegel: This, your Honor, goes back to a time when there was a remedy.

The Court: No, I am asking you. You just quoted me [fol. 19] from a case in the United States Supreme Court. You said except in a case where there is no other remedy.

Mr. Siegel: Where there never was a remedy, not when there was a remedy at the time—

The Court: That is not the way I heard you read it.

Mr. Siegel: That is the rock on which this case rests. If your Honor will accept, and I will make it very easy for you, if you will accept Mr. Edelbaum's argument that the remediless may exist at any time when it suits the convenience of the defendant to create it, then I am out of court.

My argument to you is that these cases and the statute—these federal cases and the statute apply except where there never was a remedy. There have been such cases. The law books are filled with proceedings against a man by the name of Reagan. Reagan was the warden of an Illinois prison, and the Supreme Court found that at that time Illinois had no proceeding whatever to give a man a remedy, a proper remedy of review. These cases grew up under that at-

mosphere. When they talk about being without any remedy, they mean he never had a remedy.

[fol. 20] Let me test it for you. Suppose Caminito and Bonino had not appealed and now for the first time came into this court and asked for a writ of habeas corpus. I am sure your Honor would say to Caminito and Bonino, "You had a right of appeal in the state court. You cannot come in here on a writ of habeas corpus. Why the very habeau corpus act itself prevents you from doing that." I am sure you would say that.

Does it make any difference that because Noia chose not to appeal, to avail himself of that right, that he should now have the right to come in and ask for a writ of habeas corpus?

Mr. Edelbaum says that he did not appeal because he didn't have the money, and he hold up to you this very stout volume which is the record on appeal.

The Court: I do not pay any attention to that.

Mr. Siegel: I want you to note, your Honor, that this is entitled "The People of The State of New York v. Frank Bonino and Santo Caminito." It would have been very easy to add, and that is all that would have had to be done, was to add Noia's name to that title, and for Noia to file a notice of appeal.

If we are going to speculate as to why Noia did not appeal, I will speculate. Noia was the man who fired the shot, [fol. 21] according to his confession, and according to the evidence on which the jury convicted. And it may very well be that Noia was very happy at that time and very satisfied that he got a recommendation for life imprisonment and did not want to appeal and run the risk of reversal and retrial and possible execution sentence.

But that is all speculation. I am only speculating because my learned friend did the same thing.

I come back to the bedrock of my argument and that is that this Court is prohibited, and I use that strong term advisedly, this Court is prohibited by the habeas corpus statute and by the cases in the Supreme Court from entertaining this petition for the very same simple, explicit reason that Noia, by failing to appeal from the judgment of conviction, failed to exhaust his state remedy.

Mr. Justice Reed goes on to say:

> "It is not seemly that years after a conviction, when time has dulled memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of any claim of unfairness in their trial, should be per- [fol. 22] mitted to attack their sentences collaterally by habeas corpus because of errors known to them at the time of trial. When it is shown by the record that a petitioner in a federal court for relief from a state conviction that involves a denial of constitutional rights has without adequate excuse failed to use an available state judicial remedy, although all such remedies are barred to him by limitations, I think that federal courts should not intervene to correct the error. . . . The principle that federal constitutional questions must be properly raised in state courts before they will be considered by this Court is too well established to require citation."

Your Honor, it is a very simple point.

The Court: Do you admit that what Mr. Edelbaum said that there was not any evidence in this case except the confession?

Mr. Siegel: Oh, yes.

The Court: And the corpus delicti.

Mr. Siegel: Yes.

The Court: You had none then and of course you have [fol. 23] none now?

Mr. Siegel: That is a different matter. All I know is that Mr. Edelbaum has not yet made a motion to dismiss the indictment as against Caminito and Bonino.

Mr. Edelbaum: The motion was made, granted and reversed.

Mr. Siegel: Oh, yes, but since then you have not. I do not think it is relevant, but I am conceding that on the trial Judge Brancato's charge to the jury that if they found that the confession was either untrue or involuntary, that they would have to acquit. The conviction rests on that.

I could make some distinction between Noia's case and Carminito's but I am not going to try that. I am presenting this point to your Honor purely as a question of law.

The Court: Those cases that you cite are set forth in your affidavit?

Mr. Siegel: Yes. I am urging that you do not have the power.

The Court: I do not know whether I have or not, but if I have, I am going to exercise it.

Mr. Siegel: I think you will.

[fol. 24] The Court: There is no question about that.

Mr. Siegel: I can understand how this situation might be repulsive to you. It might even be to me, despite the fact that I represent the People. But no more than I can your Honor or can a court sit and dispense justice according to a personal notion. You can give a man his rights but you cannot do him a favor, and I say that you do not have the power to give him this favor now because the statute—

The Court: I was not talking about favors. I said if I can find the power, I am going to do something. I only talked about power; I did not mention favors.

Mr. Siegel: Excuse me.

The Court: I do not deal in favors.

Mr. Siegel: Excuse me for my bad choice of words. I am just trying to make what to me is a simple point. I have had it before Judge Fuld a number of times. I have had the Caminito case, the Wolf case, the Peterson case, to Samuel Tito Williams case. I argued the Williams case in November in the Circuit Court here, and I am confidently awaiting their decision. I am just trying to make the point to your Honor that when a man fails to appeal, although no [fol. 25] warden stopped him, that is what exceptional circumstances mean.

The Court: I understand your point. You do not have to repeat it.

Mr. Edelbaum: May I just point out something?

The Court: I do not think I need any more.

It is very simple.

Mr. Edelbaum: There are a line of cases, Judge Cashin, that hold where a man had no counsel at the time of trial, that habeas corpus will issue and be vacated. Now those

are cases where a man didn't appeal. Take a case, Johnson v. Serps, which is in 304 U.S., the Frank v. Mangin case, habeas corpus on mob disorder, where there had been no appeal.

Now Mr. Siegel read to you from the very opinion of Judge Reed, which is cited in his papers, it says that: "The federal court's refusal of consideration depends on the rule that the federal courts should not utilize habeas corpus to take the place of state remedies except in extraordinary situations where otherwise the accused would be 'remediless'."

It does not say where he couldn't; it is the present tense.

And then Judge Fuld is not in the habit of using language which doesn't mean anything. When Judge Fuld in his [fol. 26] printed opinion said, as I read to you before, "nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts," talking about Noia, Judge Fuld must have recognized when he said that Noia had the right to go into the federal courts—and knowing Judge Fuld, I do not think he uses language like that unless he believes that there was some right.

Your Honor, there is no hard and fast rule for justice. Over the years, the last twenty years, we have revived the writ of coram nobis which had been forgotten completely. Each day there are new decisions by the Court of Appeals of our State on where there has been constitutional violations in the prosecution of criminal cases, where they have gone farther and farther in the way of coram nobis.

Now I say that the old writ under the Magna Charta, that habeas corpus is there to rectify an injustice. I say that this is an extraordinary case that cries out that this should be rectified.

The Court: All right. I will take the papers and reserve decision.

Mr. Edelbaum: Does your Honor want the record on appeal? I do not think it is necessary, but I have a copy [fol. 26a] of it.

The Court: No. I don't need that. There are no further citation: they are all included?

Mr. Siegel: No. I rest on those in my affidavit.

The Court: All right.

[fol. 27] New York, New York

Transcript of Hearing—March 15, 1960

(Hearing resumed.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Siegel, I am addressing my remarks to you at the present time.

Mr. Siegel: Yes, your Honor.

The Court: In the argument the other day you made certain statements with reference to making the path of the Court a little bit more easy. Can you state for the record now whether or not at the time this case was tried there were not anything except a confession plus the corpus delicti. Am I correct in that?

Mr. Siegel: That is substantially so. There were certain differences between Noia on one hand and Caminito and Bonino, but my recollection at the moment is that Judge Brancato charged the jury if they did not find the confessions to be voluntary and/or truthful, they had to acquit all the defendants.

Mr. Edelbaum: Your Honor, to help the Court, I would [fol. 28] be very happy to submit the record on appeal from the coram nobis which Judge Joyce granted and was reversed by the Appellate Division and affirmed by the Court of Appeals, and contained in that record are the minutes of the grand jury which founded this indictment and which would show your Honor that the only evidence in the case was the alleged confession.

Mr. Siegel: I would suggest, your Honor, if you want to receive record evidence, it would be preferable to receive the record of the trial and the court's charge, rather than the grand jury—

The Court: The reason I am asking the question, Mr. Siegel, is this: whether or not in this proceeding if I have a hearing, whether or not I have to include in that hearing the question of how the confession was obtained; the same thing that went through when it went to the Circuit Court of Appeals as to the other two defendants. I read that de-

cision of the Circuit Court of Appeals and they seem to say that that is it. The only reason I am asking the question of you is whether or not, and I want your help and your advice on it, is whether you think, if I have a hearing, that ought to be included in the hearing also. Personally I haven't [fol. 29] come to any conclusion yet. I am inclined to feel that if I have a hearing, I have got to have a hearing on the whole thing.

Mr. Siegel: It has been a long time since I read Judge Frank's opinion in the Circuit Court. For instance, Judge Frank makes a point of something which was true as to Caminito, but which was not true, and the record at least does not show it, as to Noia.

Judge Frank was very much impressed with the fact that when Caminito's family came to the police station with a lawyer, a Mr. Spano, they were refused the opportunity to see Carminito. I think Judge Frank uses the term that they practically kidnapped Caminito.

There is nothing that I recall in the record now which has any such episode with respect to Noia.

May I ask you a question. You see, I came here believing that what we were going to do was to work out some procedure to help your Honor in finding out why Noia did not appeal.

The Court: That I have taken care of. I will read into the record at this time what I intend to do. The only thing I want from you people is to have you both agree on a day when testimony can be taken. Perhaps it would be better [fol. 30] for the purposes of this record, if I have the hearing at this time only on the question of why he did not appeal and so on and so forth. I am holding in abeyance after that any decision as to whether I should have a full-scale hearing as to how the confession was obtained.

Mr. Siegel: In the light of my position as to Noia's failure to appeal, it is an absolute bar to this proceeding, that it would be wise, first to test out that question, aside from everything else.

The Court: I do not want to be precluded, in other words.

Mr. Siegel: We could not preclude you.

Mr. Edelbaum: Your Honor, in order to help the Court,

when this matter was before Judge Foley originally in the Northern District, we wanted to have a full-scale hearing as to the manner in which the confession was obtained, and Mr. Siegel at that time vehemently opposed it and said that everything was contained in the record of the trial. Judge Foley acceded to Mr. Siegel's request and he decided the case solely on the record.

I had here the other day the record of the trial which is the same record upon which Caminito's case was decided. All the facts that were decided by the Court of Appeals [fol. 31] were contained in that record which the Court of Appeals had before them.

In Judge Frank's opinion which appears in 222 Fed. 698, it partly says as follows, and this applies the same to Noia. He said that the sole evidence of Caminito's guilt consisted of the signed pretrial confessions. At the trial, counsel timely objected to their admission and moved to strike on the ground that they had been unconstitutionally procured. He also moved to dismiss the indictment on the ground that the State had not proved Caminito guilty. Caminito testified that the police had coerced a confession, and the trial judge left to the jury the question of whether or not the confessions had been thus induced. The jury, by finding a verdict of guilty, found that they were voluntary; and the court found that on the record that the judge had no right to send the case to the jury and that as a matter of law from the record of the trial the confessions should not have been admitted and the case should have been dismissed.

Now these same things apply to Noia.

I will go along, and I think it is proper that your Honor only at this time go into the testimony as to the—

[fol. 32] The Court: And hold in abeyance whether I want to take further testimony other than what the record on appeal shows me.

Mr. Edelbaum: I think you understand fully what happened before Judge Foley.

Mr. Siegel: As far as you went, you stated it fairly, but you did not go the whole way. That is immaterial. If your Honor is going to restrict the hearing as to why he did not appeal—

The Court: At this time. That is all, holding in abeyance whether after that I want to hold a complete hearing, a further hearing after reading the entire record as to how the confession was obtained.

Mr. Siegel: That is good, your Honor. That will enable us to get out of the way one question with which you are concerned, as to why didn't he appeal.

The Court: That's right. Before I read this into the record, is there any day you two can agree on?

Mr. Edelbaum: The most convenient time for myself—I do not know about Mr. Siegel—and probably this would not take long, would be a Friday afternoon. That would probably be a convenient time for your Honor. I am en- [fol. 33] gaged in a trial, but I know that any court where I am engaged will cooperate with me.

The Court: That is the worst day of the week you could pick out, Friday afternoon. I usually get away then.

Mr. Edelbaum: Friday morning.

The Court: Yes, I could take it on Friday morning.

Mr. Siegel: Except I ask you not to take it on Friday, the 25th. That is my 37th wedding anniversary, and my wife and I planned a weekend away.

The Court: The court certainly would take that into consideration.

Mr. Siegel: I believe that is a legal excuse.

The Court: That is a legal excuse.

Mr. Siegel: Any other day, your Honor, I will make myself available.

Mr. Edelbaum: How about the 31st of March? Rather, the 1st of April?

The Court: The 31st of March would be better. Is that all right, at two o'clock in the afternoon?

Mr. Siegel: That is fine.

STATEMENT BY COURT

The Court: I will put that in and then I will read this into the record.

[fol. 34] Now you can take this. I will read this into the record. I am also going to file this. This is an application for a writ of habeas corpus by a state court prisoner. The

relator, through his attorney, alleges that he has been deprived of his constitutional rights because he has been convicted on the basis of a coerced confession.

It is conceded that the relator did not appeal the judgment of conviction, that a subsequent petition for a writ of error coram nobis, although granted by the County Court of Kings County, was reversed by the Appellate Division, Second Department, and affirmed by the Court of Appeals. The Supreme Court subsequently denied certiorari.

The relator relies upon the abortive coram nobis proceeding as exhausting his state court remedies. I have grave doubt as to the efficacy of the coram nobis proceeding as exhausting his state court remedy. Accordingly, even though the issue has not been raised by the petitioner or the answering affidavit of the district attorney, I deem it advisable to grant a hearing on the writ, limited at this time to the circumstances surrounding the failure of the relator to take an appeal in the first instance.

[fol. 35] The hearing on the writ shall be held on the 31st of March 1960 at 2.00 p.m. At this hearing the parties shall present any evidence available to them concerning the issues to be determined on the hearing.

Let the attorney for the relator submit a writ. It is so ordered.

I will file that and you can each get a copy—have you a copy upstairs for each of them? I don't think so. You can get a copy. They will make a photostat for you.

Mr. Edelbaum: I presented the writ, and Mr. Sweeney has it.

(Adjourned to March 31, 1960 at 2.00 o'clock p.m.)

[fol. 36] New York, New York

Transcript of Hearing—March 31, 1960

(Hearing resumed.)

CHARLES NOIA, called as a witness in his own behalf, was examined and testified as follows:

Direct examination.

By Mr. Edelbaum:

Q. You are the relator in this proceeding?
A. Yes.
Q. And where are you presently confined?
A. Greenhaven Prison.
Q. And are you confined pursuant to a judgment of the County Court of Kings County, wherein on the 2nd day of March 1942 you were convicted of the crime of murder in the first degree, and sentenced to natural life in state prison?
A. Yes.
Q. Now, Mr. Noia, were you tried before the late Judge Peter J. Brancato, judge of the County Court of Kings County?
[fol. 37] A. Yes, sir.
Q. On an indictment charging you with the crime of murder in the first degree?
A. Yes, sir.
Q. Were you tried together with two co-defendants Santo Carminito and Frank Bonino?
A. Yes, sir.
Q. Were you represented by a lawyer at that trial?
A. Yes, sir.
Q. What was the lawyer's name?
A. Louis J. Wacke.
Q. And is he known now as Louis J. Walker?
A. Yes, sir.

Q. At the time that the jury rendered its verdict, did that verdict convict you of murder in the first degree with the recommendation of mercy?

A. Yes, sir.

Q. How much time elapsed between the time that you were convicted and the time that you were sentenced, if you remember?

A. I was convicted February 21, 1942. I was sentenced March 2, 1942. I was transferred to Sing Sing Prison March 11, 1942.

[fol. 38] Q. Did you have anybody on your behalf file a notice of appeal from that conviction?

A. I didn't know nothing about it at the time.

The Court: That is not responsive.

Strike it out.

Q. Yes or no. Did you file or ask anybody to file a notice of appeal?

A. No.

Q. Will you tell his Honor what happened at that time and why you did not appeal, and speak up loud so his Honor can hear you, and take your time.

A. At the time my family did not have the funds, and I did not want to put them in any more debt. They went in the hole for me and I did not want them to have any more debts for this appeal. I knew it was going to cost money, so I was figuring to wait until we are ready.

The Court: Did you make any application to appeal in the form of a poor person, a forma pauperis?

The Witness: I didn't know nothing about that.

Q. Did you know about that?

A. No.

Q. Did you know that you could make application to get a lawyer assigned to you for the appeal? Did you know [fol. 39] that?

A. No, sir.

Q. Had anybody ever told you that?

A. No, sir.

Q. Did you know that if you were convicted of first de-

gree murder and sentenced to die that you could get a free appeal? Did you know that?

A. I knew that, sir.

Q. At that time had there been something said by Judge Brancato, between the time of the verdict and the time that you were sentenced, wherein Judge Brancato had indicated that he did not want to file the recommendation of the jury?

A. Yes, sir.

Mr. Siegel: If your Honor please, I object to counsel leading this witness.

The Court: Ask him questions.

Mr. Edelbaum: I am sorry, Judge.

The Court: Strike out the question. It is leading. The answer, if any was made, is stricken out too.

Mr. Edelbaum: All right. I will rephrase it.

Q. Between the time that the jury recommended mercy and the time that you were sentenced to natural life, when [fol. 40] the judge followed the recommendation of the jury, did you have any discussion with your lawyer with respect to what Judge Brancato intended to do?

A. Well, Judge Brancato wanted—

Q. Yes, or no, I want to know.

A. Yes.

Q. What was said between you and your lawyer with respect to that?

A. Judge Brancato wanted to hold up my recommendation. My lawyer came in to speak to me, and I told him, I says, "Let him hold up my recommendation, because I will get a free appeal on it."

Q. When you say hold up your recommendation, you mean not to follow the recommendation?

A. He did not want to follow the recommendation, he wanted to sentence me to the chair.

Q. Now, did you have some distant relative who was a lawyer?

A. Yes, sir.

Q. And what is his name?

A. Caesar Cirigliano. C-i-r-i-g-l-i-a-n-o.

Q. Some time after you were in Sing Sing Prison, did Mr. Cirigliano come up to see you?

A. Yes, sir.

[fol. 41] Q. Did you have a discussion with him at that time?

A. Yes, sir.

Q. How long after?

A. It was in March, 1943.

Q. About a year after you were sentenced?

A. About that.

Q. Was there anything said at that time concerning steps to try to vacate your conviction or to appeal it?

Mr. Siegel: I object to that, if your Honor pleases, as hearsay, and it is beyond and outside—outside the issues of this hearing.

The Court: Overruled, for whatever it may be worth.

Q. Speak up. Tell his Honor what happened.

A. Mr. Cirigliano came up to see me and we talked over the appeal. I was ready for the appeal then.

Q. When you say that you were ready for the appeal then, how were you ready? That is what I want to know.

A. My family—my wife was working at the time. She was saving her money to appeal my case.

Q. Did you ever talk with Mr. Cirigliano?

A. Yes.

Q. And after you had the talk with him, did he report back to you something later?

[fol. 42] A. Yes, sir.

Q. What did he report back to you and tell you?

Mr. Siegel: May I have a continuing objection, your Honor?

The Court: Yes, sir, the same ruling.

Q. Tell me what he reported back to you?

A. He came back a few days later. I do not recall the date, and he said he wanted to see the acting D.A., the district attorney, Thomas Craddock Hughes, or something.

Q. Thomas Craddock Hughes?

A. Something like that.

Q. And was he the acting district attorney in the place of William O'Dwyer, who was serving his country at that time?

A. Yes, then he came back and he told me that no one filed notice of appeal for me.

Q. And was that the first time you learned that?

A. That was the first time I knew about it.

Q. Subsequently—will your Honor bear with me for a moment?

Some time in June of 1956, did you retain a lawyer named Maurice Edelbaum to represent you?

A. Yes, my family did.

Q. And did he make an application in the nature of a [fol. 43] writ of coram nobis.

The Court: That is a matter of record.

Mr. Edelbaum: Your witness.

Cross examination.

By Mr. Siegel:

Q. Mr. Noia, you were sentenced on the second of March, 1942?

A. Yes, sir.

Q. Mr. Walker had been your trial lawyer?

A. He was known as Mr. Wacke at the time.

Q. I understand that Mr. Wacke was representing you?

A. Yes.

The Court: What was his name then?

Mr. Siegel: Wacke, W-a-c-k-e.

Q. At any time within 30 days, I want you to bear that period in mind, at any time within 30 days after March 2nd, 1942, did Mr. Walker come to see you in Raymond Street jail?

A. Yes, sir.

Q. Did he talk to you about taking an appeal?

A. He was talking about an appeal, but at the time I did not want an appeal.

Q. In other words, you told Mr. Walker that you did not want to appeal?

[fol. 44] Mr. Edelbaum: That is not what he said.

Mr. Siegel: Have you an objection to my question?

Mr. Edelbaum: Object to the rephrasing of the question, because it is not reporting it accurately.

The Court: The objection is overruled.

Q. Did you tell Mr. Walker that you did not want him to appeal on your behalf?

A. No, not in words like that; I was not ready to appeal at the time.

Q. You did not instruct him to appeal within 30 days after the judgment was entered, is that right?

A. I did not know nothing about it.

Q. If you did not, then the only reason that you had in your mind at the time was that you had no funds?

A. At the time, yes, sir.

Q. That is the only reason?

A. I had no funds at the time.

Q. If you did have money, would you then have appealed?

A. I would have got a different lawyer to appeal.

Q. Would you have instructed some lawyer to appeal for you?

A. Yes.

[fol. 45] Q. So that we are clear the only reason you are now telling this Court that you did not appeal is because you did not have money for the expense?

A. At the time.

Mr. Siegel: That is all.

Redirect examination.

By Mr. Edelbaum:

Q. And the other reason is that you did not instruct Mr. Walker—

The Court: Wait a minute. The other reason was—you are leading your own witness again. If you have any questions, ask him. I will let you ask him, but do not frame them in that language.

Mr. Edelbaum: I am sorry.

Q. Did you tell Mr. Siegel just now on cross examination that you did not want Mr. Walker to represent you any further?

A. That is right.

Mr. Siegel: I object. What he told me and what he said to the Court is on the record.

The Court: It is a matter of record.

Was this fellow Walker a paid attorney at the time?

The Defendant: Yes.

The Court: He was your paid lawyer?

[fol. 46] The Defendant: Yes, sir.

The Court: He was not assigned counsel?

The Witness: No, sir.

The Court: All right, I have no further question.

Mr. Edelbaum: That is the relator's case on this question, your Honor.

Mr. Siegel: Mr. Walker, will you take the stand, please?

Louis J. Walker, called as a witness on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Siegel:

Q. Mr. Walker, are you an attorney duly licensed to practice in the courts of the State of New York?

A. I am.

Q. When were you admitted?

A. December, 1927.

Q. From 1927 on, did you practice in the County Court of Kings County?

A. I did, sir.

Q. And that court is a court of exclusive criminal jurisdiction?

A. Yes.

Q. Would you say that in the years that followed, up to and including 1942, you had a steady criminal practice?

[fol. 47] A. Substantial criminal practice.

Q. You have seen the relator Noia testify?

A. I did.

Q. Do you remember any contact with him previous to today?

A. Oh, yes.

Q. Tell the Court please, what your contact was.

A. I was his trial counsel in the case against him in the County Court where he was charged with the two others as a defendant in a murder case.

Q. Those two others were Bonino and Caminito?

A. Yes.

Q. And Noia and the co-defendants were convicted of murder in the first degree?

A. Yes.

Q. And the jury in that case recommended leniency?

A. They did.

Q. And Judge Brancato followed their recommendation, and on March 2, 1942, sentenced the three defendants to respective terms of natural life?

A. That is so.

Q. After March 2, 1942, did you see Noia again when he was committed to Sing Sing to enter upon the service [fol. 48] of that sentence?

A. I did.

Q. Where?

A. In Raymond Street Jail.

Q. Was that at any time before the expiration of the 30 days following the imposition of sentence and judgment?

A. It was within the statutory period provided for an appeal, within 30 days.

Q. Within 30 days?

A. That is true.

Q. Did you have a conversation with him concerning an appeal?

A. I did.

Q. Will you please tell the Court what you said to him and what he said to you?

A. I do not think, your Honor, that I can recall what was said between us. I could more or less revaluate what was said, in the nature of a summary.

Mr. Edelbaum: I object to an evaluation.

Q. Can you give us the substance of it?

The Court: Do not evaluate it. Give us your best recollection as to what took place between you and Noia on that day in question.

[fol. 49] A. When I went to see him, we did discuss the advisement of taking an appeal from this verdict of this jury and from the sentence of the Court.

Q. May I interrupt? When you went to see him, did you know whether or not at that time, Caminito or Bonino, or either one of them, had already appealed from the judgment?

A. That I don't know. I did not know. I only represented Noia.

Q. When you went into Raymond Street Jail and talked to Noia, you did not know that Caminito and Bonino had already appealed?

A. I think—

Mr. Edelbaum: I object to him thinking.

A. (Continuing) My best recollection is that there was a decision by the co-defendants to appeal. Whether they had filed notice or engaged counsel, I did not know at the time.

Q. But you knew of their decision to appeal?

A. I knew that there was a plan to appeal.

Q. What did you say to Noia and what did he say to you?

A. I asked him whether he wanted a notice of appeal filed and also an appeal to be taken, because of the fact [fol. 50] that in my opinion an appeal would result favorably to his case.

Q. Did he answer you?

A. Substantially he told me not to take an appeal.

Q. Did he tell you why he did not want you to take an appeal?

A. We had a lengthy discussion and I think—

Mr. Edelbaum: I object to what he thinks.

A. (Continuing) My recollection is that he gave me a couple of reasons why he did not want to appeal.

Q. Do you remember what those reasons were?

A. One of them was that he felt that if there was a reversal and a new trial was ordered, maybe the next jury would not recommend mercy.

He also told me, in substance, that his family was very financially embarrassed and had no funds, but I do not think that was gone into too deeply. He did not want to appeal. That was it.

Q. Do you remember whether contemporaneous with the Bonino and Caminito and Noia case, there had been a case in Brooklyn, a murder case, involving a defendant named Hull?

A. I do, sir.

Q. Do you remember the chronology and the history [fol. 51] of the Hull case?

Mr. Edelbaum: I object to that.

The Court: I do not see how it is material. I have an idea what you want to bring out, but I do not see how that is going to affect the case.

Mr. Siegel: May I make an offer of proof through this witness that a defendant, a man named Hull, had been tried for murder in the first degree in Kings County, had been convicted and there had been a recommendation for clemency, which was followed by the Court, that there was an appeal and the judgment was reversed and Hull was retried and sentenced to death, and this defendant knew of those facts.

The Court: Ask him if he talked about the Hull case. I will permit that.

Q. Did you talk to Mr. Noia about the Hull case while you were in there talking to him about taking an appeal?

A. I think there was discussion.

Mr. Edelbaum: I object to what he thinks.

A. (Continuing) My recollection is that the Hull case was discussed by us.

The Court: When you say "between us," you mean Noia and you?

[fol. 52] The Witness: Noia and me.

Q. Do you remember whether or not Noia exhibited to you a familiarity with the Hull case?

A. I have no recollection.

The Court: The question is improper in form.

Q. Do you know whether or not Noia mentioned the name of Hull during your conversation with him?

A. I do not remember that.

Q. Would you try to refresh your recollection, Mr. Walker? Would it help you to refresh your recollection if I told you that you and I talked about this matter before you came here as a witness?

A. Correct.

Q. Will you try to refresh your recollection on that subject?

A. It refreshes my recollection that the name of Hull and the Hull case was discussed, but whether Noia mentioned the name Hull, I cannot say.

Q. Did you mention the name to him?

A. Most likely I did.

Q. Am I correct in my summary of what happened in the Hull case, that I gave you here?

A. I think your statement is an absolute fact.

Q. Did you call the fact of the Hull case and its history [fol. 53] to Noia's attention during this conversation in the Raymond Street Jail?

A. My recollection is that it was discussed by us.

Mr. Edelbaum: I move to strike it out as not responsive.

Mr. Siegel: I will withdraw it.

The Court: Let me have the question.

(Question read by the reporter.)

Mr. Siegel: I withdraw it.

The Court: Withdraw it and ask it again.

Q. Did you mention the Hull case to Noia?

A. My recollection is that I did.

Q. Did Noia mention the Hull case to you?

A. My recollection is that we discussed it.

Q. Did you tell Noia what had happened to Mr. Hull and the retrial?

A. I do not remember. I remember we discussed the Hull case, we discussed the fact that Hull had taken an appeal, and that his appeal resulted in a very unfavorable respect on the second trial.

We also discussed the fact that Judge Brancato had practically said in open court that it was only by the merest —what shall I say, in other words, that he was on the brink of being sentenced to death and that Judge Brancato at [fol. 54] the last minute, during the night before sentence, had changed his mind and had decided to follow the jury's recommendation in his case.

Q. Am I stating the substance of what you told him correctly when I say that Noia told you not to appeal for two reasons; that one reason was that the family had no money and the other reason was that he did not want to risk a retrial and a possible conviction and sentence to death?

A. That is substantially true.

Q. Now, Mr. Walker, were you back in those days, might I say, a specialist in the practice of state criminal law?

A. I did a lot of it. I had other practice. I would not say that I was a specialist to the exclusion—

Q. May I withdraw it. I meant it in a complimentary fashion. Did you have a large, substantial criminal practice?

A. I had a good practice.

Q. You were familiar with the appellate practice in criminal cases, were you not?

A. I certainly was.

Q. And you knew that an indigent defendant who could not print the record could make an application to go up [fol. 55] on—

Mr. Edelbaum: I object to what he knew.

The Court: I will let the question be answered by him.

Q. You knew that an indigent defendant could make application to the Appellate Division and if he showed some merit in his case, the Appellate Division would permit him to come up on original typewritten record, did you not?

A. Sure I knew that.

Q. And you also knew that if the indigency was sufficiently acute the Appellate Division would assign counsel for the appellant?

A. I certainly knew that.

Q. When Noia told you that one of the reasons for not appealing was that his family had no money, did you call that to his attention?

A. Of course.

Q. You did?

A. Of course I did.

Mr. Siegel: That is all.

Cross examination.

By Mr. Edelbaum:

Q. Of course you did. You remember that, Mr. Walker? [fol. 56] A. I remember we discussed his predicament in state court. I would not say in particular, no.

Q. Let me ask you this question, Mr. Walker: you were retained to defend this man charged with a capital crime, is that right?

A. I was.

Q. You knew at that time that the only evidence in the the case against him was a confession, an alleged confession, is that right?

A. That is correct.

Q. And you knew that in your experience as an experienced lawyer that that confession was coerced, is that right?

A. I thought that was the evidence in the case. That was my evaluation of it.

Q. At all times did Mr. Noia tell you that he was absolutely innocent of this crime?

A. He did.

Q. Did he tell you that he was innocent after the jury rendered its verdict?

Mr. Siegel: I object to that.

The Court: Allowed. I will take it.

A. He said that. He maintained his innocence every time that I came in contact with him. That is

[fol. 57] Q. That is a fair answer. Is it a fact that there was a great to-do after the verdict wherein Judge Brancato indicated that he might not follow the recommendation?

A. There certainly was.

Q. Is it a fact that in your discussions with the defendant after the verdict he was very much upset that he had been convicted for a crime which he did not commit.

Mr. Sieged: I object. We are not retrying the case.

The Court: If you will confine it to a conversation had between Noia and this lawyer, I will take it.

A. I think he was upset by the jury's verdict.

Q. He related to you that he was very much upset that he was convicted for a crime which he did not commit?

A. I think he did. He evinced that feeling. I do not know about the words that he used. I think he was very much upset at his conviction.

Q. In your discussions with him, did you tell him that you would undertake his appeal without money?

A. It was never discussed.

[fol. 58] Mr. Sieged: I object to that as improper cross examination. There has been no direct question asked by me and no answer, suggesting that Mr. Walker—

The Court: There is not any question about that but I will take the answer. There is no question about his duty, but I will permit the question and the answer.

A. I did not offer to take the appeal for nothing. Is that what you mean?

Q. Yes.

A. I did not offer that, no.

Q. As a matter of fact, isn't it your best recollection that Mr. Noia, after the verdict, said that he wanted to get another lawyer, a specialist on appeal, that his family could afford it.

A. I do no remember that.

Q. Would you say it did not happen?

A. I would not say it did not happen.

Q. It is your memory that he was quite upset by the fact that the case had cost his family a lot of money and they had no money?

A. He mentioned the fact that his family had no money. I do not remember anything else.

Q. In respect to the whole case, is it your memory that [fol. 59] you at that time told him that there was a risk in view of the fact that the Hull case had happened; if he got a new trial another jury might convict him of murder in the first degree? Did you tell him that?

A. That is not my recollection at all. I do not recall that.

Q. Who proposed the Hull case to him first?

A. I do not remember. I remember it was discussed. I remember every question that this man asked me as to his position, what would happen if a reversal came, could it happen like that case, maybe he would go to the chair on the second trial, and whatever was discussed I gave him a legal answer.

Q. Now let me ask you this question: when you left that day, it was your understanding that he did not want you as a lawyer to handle his appeal, is that right?

A. It was my understanding—no, that was not my understanding.

Q. Did you have an impression?

A. If you want to know what my impression was, I cannot tell you. That was not my impression.

Q. Let me ask this question: you felt that when you left there that day that he had been unjustly convicted, is [fol. 60] that right?

A. I felt that, surely.

Q. And when you left there that day, you felt that the defendant was very upset about the fact that he had been unjustly convicted, is that right?

A. I certainly did.

Q. What?

A. That is correct.

Q. At no time up to the time you left had there been any statement by him to you that he was not guilty of this crime?

A. He never said he was guilty.

Q. He maintained his innocence right up to the time you left him for the last time, is that right?

A. He certainly did.

Q. You know as an experienced lawyer that the mere filing of the notice of appeal in the County Court of Kings County does not require a defendant to perfect that appeal and go through with it.

A. I know that.

Q. And you know that there are many defendants who file notice of appeal and it is subsequently dismissed for lack of prosecution, is that right?

Mr. Siegel: If your Honor please, I object to this unless [fol. 61] Mr. Edelbaum offers to prove that a formal notice of appeal was filed.

Mr. Edelbaum: I am not offering to prove that at all. I have a purpose in my mind, if your Honor will permit it.

The Court: I will take it.

A. Would you have the reporter read that back?

(Question read by the reporter.)

A. Yes.

Q. Here was a man convicted of a crime, that you felt was unjust, right?

A. Correct.

Q. A crime which he told you he was innocent of, right?

A. Correct.

Q. Didn't you think it was your duty as an officer of the court to file a notice of appeal to protect him and if he changed his mind and later they did get money they could prosecute the appeal?

A. No.

Mr. Siegel: Object to that.

The Court: Let's have the answer. I will sustain the objection. That is not anything to do with this, what he did or didn't do. It is a simple question here.

[fol. 62] Mr. Edelbaum: I have no further questions.

Redirect examination.

By Mr. Siegel:

Q. Mr. Walker, Mr. Edelbaum asked you whether or not it was a fact that when you left Noia that day, you had the impression that he no longer wanted you to be his lawyer, and your answer was that you did not have the impression. Do you remember?

A. That is correct.

Q. And then Mr. Edelbaum would not allow you to tell the Court what your impression was or that you did have.

A. That is correct.

Q. What impression did you have?

Mr. Edelbaum: I want to know what was said. I do not think I have opened the door.

The Court: I do not think impression is quite proper.

Mr. Siegel: I submit, your Honor, that those are the words that he used.

The Court: Do you remember what the conversation was that you had? That is, when you left?

The Witness: Substantially, when I left him he said that he did not want to appeal. I told him that he had to [fol. 63] make up his mind within 30 days, if he wanted me to file notice of appeal, I would gladly do it for him, but that he had to let me know within the appeal period. From that day to this he never asked me to take an appeal. That is my position in this matter.

Mr. Siegel: That is all.

The Court: Any further testimony?

Mr. Edelbaum: Yes, I would like some rebuttal.

The Court: Have you rested?

Mr. Siegel: That is my only witness.

(Witness excused.)

CHARLES NOIA recalled.

Direct examination.

By Mr. Edelbaum:

Q. Mr. Noia, you have heard Mr. Walker testify?

A. Yes, sir.

Q. Did you at any time have any discussions with Mr. Walker about the so-called Hull case?

A. I never heard of the Hull case.

Q. Did you at any time tell Mr. Walker that you did not want to appeal because you felt that on a reversal you might get the electric chair?

A. No, sir. I told Mr. Walker that when Judge Brancato wanted to hold up my recommendation, to hold up my recommendation because I get free appeal. I was not [fol. 64] scared of the chair. I wanted the chair at the time.

Q. How long have you been in prison?

Mr. Siegel: Object to that.

A. Since 1941.

The Court: That is a matter of record.

Mr. Siegel: I might suggest to Mr. Edelbaum that we do not have a jury here.

Mr. Edelbaum: This jury, Judge Cashin at the time.

The Court: And I have got pretty good hearing, too. You do not have to talk so loud.

Mr. Edelbaum: I am sorry, Judge. I have no further questions, unless the Court wants to ask him something.

The Court: The hearing is closed, I take it.

Mr. Edelbaum: Your Honor, can I call something in the case to your Honor's attention?

The Court: If you have anything you want to submit to me, Mr. Edelbaum, I am not going to take it down. If you have a memorandum that you want to file, I will be glad to take it.

Mr. Edelbaum: Very well. Thank you.

The Court: Today is Thursday. How long do you want? [fol. 65] Mr. Edelbaum: I would like until next Wednesday, Judge.

The Court: Okay. There is no objection to that. When you file with me, serve your adversary with a copy.

Do you want a couple of days to reply, Mr. Siegel?
Mr. Siegel: May I have until Monday?
The Court: Yes.
Mr. Siegel: Is the relator ordered returned?
The Court: He is ordered returned to Sing Sing—not Sing Sing, Greenhaven. He is ordered returned to Greenhaven. That writ is satisfied, so far as the present is concerned. This writ is satisfied. In other words if you want him down again, have a new writ.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 66] [File endorsement omitted]

[Handwritten notation—Iss. Writ Ret. 3/31/60.]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#25813

60 Civ. 482

UNITED STATES OF AMERICA *ex rel.*
CHARLES NOIA, Relator,

—against—

EDWARD M. FAY, as Warden of Greenhaven Prison, State of New York, Respondent.

MEMORANDUM—March 14, 1960

CASHIN, D.J.:

This is an application for a writ of habeas corpus by a State court prisoner. The relator, through his attorney, alleges that he has been deprived of his constitutional rights because he has been convicted on the basis of a coerced confession.

It is conceded that the relator did not appeal the judgment of conviction and that a subsequent petition for a writ of error *coram nobis*, although granted by the County Court of Kings County, was reversed by the Appellate Divi-

sion, Second Department, and affirmed by the Court of Appeals. The Supreme Court subsequently denied certiorari.

Relator relies upon the abortive *coram nobis* proceeding as exhausting his State court remedies. I have grave doubt [fol. 67] as to the efficacy of the *coram nobis* proceeding as exhausting his State court remedies. Accordingly, even though the issue has not been raised by the petition or the answering affidavit of the District Attorney, I deem it advisable to grant a hearing on the writ, limited at this time to the circumstances surrounding the failure of the relator to take an appeal in the first instance.

The hearing on the writ shall be held on the 31st day of March, 1960 at 2 p.m. At this hearing the parties shall present any evidence available to them concerning the issues to be determined on the hearing.

Let the attorney for the relator submit a writ.

It is so ordered.

Dated: New York, N. Y., March 14th, 1960.

John W. Cashin, United States District Judge.

[fol. 68] [File endorsement omitted]

In United States District Court

Southern District of New York

#25904

60 Civ. 482

United States of America *ex rel.*
Charles Noia, Relator,

—against—

Edward M. Fay, as Warden of Greenhaven Prison, State of New York, Respondent.

Opinion—April 8, 1960

Appearances:—

Maurice Edelbaum, Esq., Attorney for Relator, 1440 Broadway, New York, N. Y.

Edward S. Silver, Esq., District Attorney, Kings County, Attorney for Respondent, Brooklyn, New York; William I. Siegel, Esq., Assistant District Attorney, Of Counsel.

CASHIN, D.J.:

This is a petition for a writ of habeas corpus brought by the relator's attorney.

[fol. 69] The relator, along with two others, namely, Frank Bonino and Santo Caminito, was arrested on Sunday, May 11, 1941 by the New York City Police Department in connection with a homicide which occurred during the commission of an armed robbery on February 16, 1941 on the streets of Brooklyn.[1] Each of the three arrested later confessed to the crime under investigation, were indicted and were found guilty of murder in the first degree. The only evidence adduced at the trial was the fact that the crime had been committed and the confessions of the defendants.

The trial was conducted on the theory of "felony murder". Under New York State law the death sentence is not mandatory in a felony murder case. Rather, the jury may recommend mercy and if this recommendation is accepted by the court a sentence of life imprisonment is imposed. In the trial, of which the relator presently complains, the jury recommended mercy for all three defendants. Although the trial court ultimately accepted the recommendation as to all three, the acceptance as to the relator was made with [fol. 70] great reluctance since the relator had confessed to being the defendant who had actually perpetrated the homicide.

The defendants, Bonino and Caminito, appealed their conviction to the Supreme Court, Appellate Division, Second Department and, on affirmance by that court, to the Court of Appeals of the State of New York. In these appeals there

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[1] In the petition relator's attorney states that the relator was "taken into custody" and distinguishes such action from an "arrest". Whether there is any distinction between those two terms I will not consider since, for the purpose of this Opinion, any such distinction is irrelevant. I will, therefore, use the term of "arrest" to describe the action taken by the police.

was presented for consideration by the appellate courts the federal constitutional question of denial of due process because of the admission of coerced confessions. The convictions were affirmed by both courts. Neither defendant petitioned to the Supreme Court of the United States for certiorari at that time. The relator did not appeal at all. Sometime later, the codefendant Caminito moved in the Court of Appeals of New York for reargument. This reargument was denied (297 N.Y. 882). At still a later time Caminito moved again for reargument and again reargument was denied (307 N.Y. 686). Caminito then made a timely petition to the Supreme Court of the United States for review by certiorari. This petition was denied (348 U.S. 839). After the denial of certiorari, Caminito petitioned for a writ of habeas corpus in the United States District Court for the Northern District of New York alleging dep[fol. 71]rivation of his constitutional rights because of the use of a coerced confession. The petition was dismissed (127 F. Supp. 689). On appeal to the Court of Appeals for the Second Circuit the denial of the petition was reversed and on the basis of the state court record the confession was held to have been coerced (222 F. 2d 698). Caminito was released and is still at liberty although he remains under indictment.

Taking advantage of Caminito's successful proceedings Bonino moved in the Court of Appeals of New York for reargument. This motion was granted (309 N.Y. 950) and, on the reargument, Bonino was successful, the Court of Appeals of New York reversing the conviction on the authority of the decision of the Court of Appeals for the Second Circuit in the Caminito case (1 N.Y. 2d 752). Bonino is also presently at liberty although still under indictment.

The relator was not able, of course, to follow the proceedings pursued by either Caminito or Bonino since he had not appealed the original conviction. Rather, the relator brought in the sentencing court, the County Court of Kings County, a proceeding in the nature of a writ of error *coram*

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[2] The New York Court of Appeals rules have no time limitation for a motion for reargument.

nobis. This proceeding was successful, the conviction was set aside and the relator was released. However, upon appeal the Appellate Division of the Supreme Court, Second Department reversed the County Court, the Court of Ap- [fol. 72] peals of New York affirmed the reversal, and the Supreme Court of the United States denied certiorari. (County Court, 6 Misc. 2d 447, 158 N.Y.S. 2d 683; Appellate Division, 4 A.D. 2d 698, 163 N.Y.S. 2d 796; Court of Appeals, 3 N.Y. 2d 596, 170 N.Y.S. 2d 799; Supreme Court, 357 U.S. 905). Subsequently, the instant proceedings were commenced in this court. A judge of this court entertained the petition and ordered the respondent to show cause why the writ should not issue. On the argument of the order to show cause I issued the writ for the limited purpose of a hearing on the circumstances surrounding the relator's failure to appeal the conviction in the first instance. The hearing was held on March 31, 1960. At this hearing the relator testified on behalf of himself and his trial attorney testified on behalf of the respondent. Based upon the state court proceedings and that hearing I have determined that the writ must be dismissed.

Section 2254 of Title 28 U.S.C. provides that –

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

[fol. 73] In one sense, of course, the relator has exhausted his state court remedies since there is no proceeding available to him in the State, apart, of course, from executive clemency, which can effect his release from a patently un-

constitutional detention.[3] However, exhaustion of state court remedies does not only mean that at the time of the petition before the Federal District Court there is no remedy available in the State. It further means that the relator has availed himself of at least one corrective process available in the courts of the state if there be such a process. (*Ex parte Hawk* (1944), 321 U.S. 114; *Brown* v. *Allen* (1953), 344 U.S. 443). That there was a state court process available to the relator is obvious since the codefendants have obtained their releases.

The relator claims that he has invoked a corrective process in the state court by means of the *coram nobis* proceeding. In my prior Memorandum in this case filed on March 14, 1960 ordering that the writ issue, I characterized the *coram nobis* proceeding as "abortive", I utilized this term since the Court of Appeals held, in its opinion on the *coram nobis* proceeding, that the relator could not obtain a review of his conviction by *coram nobis* because of the [fol. 74] coerced confession since such review could have been obtained by appeal. Thus, it is clear that the constitutional question presented here was not passed upon by the state appellate courts in either the *coram nobis* proceeding, because the court would not consider the question, nor in direct appellate proceedings because the relator took no appeal.

The relator has not, therefore, within the meaning of Title 28 U.S.C. § 2254, exhausted his state court remedies. I had thought that perhaps a hearing on the circumstances surrounding the relator's failure to appeal might reveal some exceptional circumstances which would excuse the lack of invocation of the ordinary appellate procedure. The hearing, however, utterly failed to reveal any such circumstance.

Relator's trial counsel testified that he had advised relator of his rights to appeal. The relator did not at all

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[3] Even a cursory reading of the opinion of the Court of Appeals for the Second Circuit in the Caminito case (222 F. 2d 698) indicates that all of the defendants were coerced, and the Court of Appeals of the State of New York in the Bonino case has recognized this (1 N.Y. 2d 752).

deny that he knew of his rights to appeal. He, however, testified that he did not appeal because he had no funds to retain an attorney to prosecute the appeal and did not wish to put his family further into debt.[4] However commendable [fol. 75] this motive for not appealing might be, it does not aid the relator.[5]

The Court of Appeals for the Second Circuit has held, as recently as 1957, that indigency alone cannot excuse a failure to appeal so as to give a state court prisoner a right to invoke federal habeas corpus. This decision was rendered in the case of *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520. In that case, as here, the petitioners grounded their right to be released on the assertion that coerced confessions were used against them. There the petitioners did appeal their conviction to the Appellate Division, which affirmed such conviction. The affirmance was not appealed but motions for reargument were made. The motions were denied and leave to appeal from that denial was denied by the Court of Appeals. A petition for a writ of certiorari to the Supreme Court was also denied. Under these circumstances, the Court of Appeals for the Second Circuit held that—

> "• • • the merits of the case were never presented either to the Court of Appeals or the United States Supreme Court."

[fol. 76] So, in the instant proceeding the merits of the case were not presented to those courts nor even to the appropriate Appellate Division. There, as here, the petition-

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[4] The respondent adduced evidence which tends to show that the relator's motive for not appealing might well have been the fear that on a retrial the death penalty might be imposed. I prescind from making any finding on this issue since I think it is entirely unnecessary.

[5] I might note, in passing, that absolutely no evidence of the indigency of relator's family was adduced at the trial except the relator's conclusory statement, despite the fact that there were several spectators at the hearing who were presumably relatives of the relator. In addition, absolutely no explanation was offered by relator for his failure to proceed to adduce any such evidence of indigency.

ers sought to avoid the effect of their failure to appeal by reason of poverty but without success. Here, as there, the relator must also be unsuccessful.

The relator relies exclusively on the case of *United States ex rel. Alvarez* v. *Murphy* (2 Cir. 1957), 246 F. 2d 871. In the *Alvarez* case, once again, the alleged deprivation of due process was the utilization of a coerced confession. There, as here and in *United States ex rel. Kozicky* v. *Fay, supra*, the relator failed to exercise the state court remedies by way of appeal. There, as here, the relator brought *coram nobis* and was unsuccessful. In the *coram nobis* proceeding the relator, as the present relator, went through the entire state court hierarchy of courts including denial of certiorari by the Supreme Court of the United States. There, however, relator was held to have exhausted his state court remedies. The case, however, I believe is distinguishable. The Court of Appeals found that all of the circumstances tending to show coercion were not before the trial court. It did, however, find that all those circumstances were before the state courts in the *coram nobis* proceeding and before the federal courts in the habeas corpus proceeding since [fol. 77] it stated (246 F. 2d at p. 873)—

> "It cannot be argued that because these matters were not brought to the jury's attention Alvarez may be foreclosed from raising them in the *coram nobis* proceeding or in this proceeding".

Thus, the Court of Appeals found that the question of coerced confession had been properly presented to the state courts for review and thus was properly before the federal courts for review.

In the instant case there has been absolutely no showing, in fact it appears conceded otherwise, that any facts tending to show coercion were presented in the state court *coram nobis* proceeding which were not presented at the trial and thus available for review by the state courts by way of appeal. As a further indication of the weakness of the *Alvarez* case to support the present relator is the fact that the author of the *Alvarez* opinion, decided July 9, 1957, Judge Lumbard, concurred in the opinion of Judge Water-

man in the *Kozicky* case decided September 20, 1957, only some two and one-half months subsequent to the *Alvarez* decision.

A very recent case decided by the Court of Appeals for the Second Circuit also supports my conclusion. This case is *United States ex rel. Williams* v. *La Vallee*, decided March 28, 1960. In the *Williams* case the coercion point was raised by appeal to the Court of Appeals of New York [fol. 78] State. In the Court of Appeals, however, the American Civil Liberties Union was permitted, as *amicus curiae*, to submit a brief in which it was argued that a statute of New York State allowing the sentencing judge to consider an ex parte pre-sentence report as an aid to his decision as to whether to accept the jury's recommendation of mercy in a felony murder case was unconstitutional under the 14th Amendment. The verdict of conviction and sentence of death was upheld by the Court of Appeals. Review of the Court of Appeals' holding that the New York State statute attacked was constitutional could be had by appeal. Review of the holding that the confession was not coerced could be had, however, only by certiorari. Williams' counsel chose to come before the Supreme Court by way of appeal. Under these circumstances the Court of Appeals for the Second Circuit held that Williams had not exhausted the state court remedies because the Supreme Court had not been presented with the coercion question.

On the reasoning in the authorities cited above I feel constrained to dismiss the writ because of relator's failure to exhaust his state court remedies. In taking this action I am not unaware that an anomalous situation is presented. This anomaly arises as follows:—

If a state is zealous in assuring that unconstitutional convictions are not obtained and to this end allows a post-conviction remedy other than appeal, the federal court has [fol. 79] jurisdiction to review the state court conviction no matter when this post-conviction remedy is availed of. On the other hand, if a state is far less zealous in the interests of justice and refuses any post-conviction remedy on grounds which could have been raised by appeal, the federal courts are precluded from any review if an appeal be not

taken. However, this is the only conclusion which I can reach on a review of the decided cases.

I have reached the conclusion that I must dismiss the writ. I have done this with great reluctance. Not only is the anomalous situation just pointed out present but also my dismissal of the writ leaves one codefendant incarcerated for the term of life imprisonment while the other two codefendants, convicted on the basis of precisely the same coercion, are virtually scot free.[6] Accordingly, I have determined that a certificate of probable cause should issue.

Writ dismissed. Certificate of probable cause granted.

It is so ordered.

Dated: New York, N. Y., April 8th, 1960.

John M. Cashin, United States District Judge.

[fol. 80]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 308—October Term, 1960

Argued April 20, 1961

Docket No. 26557

UNITED STATES OF AMERICA, *ex rel.* CHARLES NOIA,
Relator-Appellant,

—v.—

EDWIN M. FAY, as Warden of Greenhaven Prison,
State of New York, Respondent-Appellee.

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[6] Even though Bonino and Caminito still remain under indictment it is most highly improbable that they will ever be tried again since the State presented no evidence but the presently unavailable coercion confessions in 1942. The obtaining of new evidence would appear at this late date impossible. (See *People* v. *Caminito*, 4 A.D. 2d 697, 163 N.Y.S. 2d 699).

Before: Waterman, Moore and Smith, Circuit Judges.

Appeal from order, United States District Court for the Southern District of New York, Cashin, J., dismissing, after hearing, relator's application for issuance of a writ of habeas corpus. Reversed and remanded with instructions to issue the writ, unless relator is accorded a new trial forthwith.

Edward Q. Carr, Jr., Legal Aid Society (Leon B. Polsky, appellate counsel), New York City, for Appellant.

[fol. 81]

Edward S. Silver, District Attorney, Kings County (William I. Siegel, Asst. District Attorney, of counsel), for Appellee.

Opinion—February 7, 1962

Waterman, Circuit Judge:

Relator, Charles Noia, and two others, Frank Bonino and Santo Caminito, were convicted twenty years ago under the laws of the State of New York for the crime of murder in the first degree upon an indictment alleging a felony murder in that they committed a homicide while engaged in an armed robbery. At trial the State offered nothing to connect any of the three with the crime except their several confessions, admitted into evidence over objections by defense counsel on the ground that the confessions were involuntarily made. Each defendant testified in his own defense and introduced evidence that each of the three confessions was obtained by police coercion in violation of the Fourteenth Amendment. The issue of the voluntariness of these confessions was submitted to the jury, the judge charging that if the confessions were found to be involuntary ones the defendants should be acquitted. The jury returned verdicts of guilty but, as it may do in New York in felony murder cases, recommended clemency.

The judge accepted the jury recommendations and sentenced each of the three defendants to life imprisonment. Necessarily implied in the verdicts was a jury finding that the three confessions were not involuntary.

Bonino and Caminito appealed their convictions to the New York Supreme Court, Appellate Division, Second Department, and, on affirmance by that court, 265 App. Div. 960, 38 N. Y. S. 2d 1012 (1942), appealed to the New York Court of Appeals, 291 N. Y. 541 (1943). Noia did not appeal. Both of the appellate tribunals considered whether the two appealing defendants had been denied due process [fol. 82] of law by the use of their allegedly coerced confessions. The courts rejected the appellants' contentions, and affirmed the convictions. Neither Caminito nor Bonino petitioned the United States Supreme Court for certiorari at that time. Later, on two different occasions, Caminito moved the New York Court of Appeals for reargument of his appeal. These motions were denied, 297 N. Y. 882 (1948); 307 N. Y. 686 (1954).[1] After the second denial Caminito filed a petition in the U. S. Supreme Court for certiorari, which was denied, 348 U. S. 839 (1954).

Caminito forthwith petitioned the United States District Court for the Northern District of New York for the issuance of a federal writ of habeas corpus. He once more claimed that he had been denied due process of law at his New York State trial by the admission against him of his coerced confession. His petition was denied, 127 F. Supp. 689 (1955), but on appeal to our court the district court was reversed, 222 F. 2d 698 (1955). We held, as a matter of law, that Caminito's confessions had been coerced in violation of his right to due process of law under the Fourteenth Amendment and that consequently his conviction was void. A petition for certiorari to the U. S. Supreme Court was denied, 350 U. S. 896 (1955).

Thereupon Bonino, the other defendant who had appealed his conviction, petitioned the New York Court of Appeals for reargument of his appeal. That court granted his application, reversed the conviction, and ordered that

[1] The rules of the New York Court of Appeals impose no time limit within which a motion for reargument must be filed.

upon retrial his coerced confession not be introduced against him. *People* v. *Bonino*, 1 N. Y. 2d 752 (1956). In fact, neither Caminito nor Bonino has ever been retried, as indeed it would appear to be impossible to obtain their convictions without the use of these confessions; and, [fol. 83] though they continue to be subject to indictment, they are free from restraint.

As previously stated, Noia, the relator here, did not appeal from his conviction. Hence the post-conviction procedure of applying for a belated reargument in the New York Court of Appeals, utilized first by Caminito and then by Bonino, was unavailable to him. Nevertheless, Noia was convicted at the same trial as were the other two, and convicted by the same means; therefore, if their convictions were void it seemed reasonable to incarcerated Noia that his conviction was also void. He thereupon moved to set aside his conviction and sentence by a proceeding in Kings County Court, the court wherein he was originally tried, convicted and sentenced. Noia could maintain no ground for setting aside his conviction other than the contention that his coerced confessions were inadmissible, a ground urged upon the trial court at the time of trial. He argued that since this ground had sufficed to void the convictions of his companion defendants, Caminito and Bonino, the sentencing court must have inherent power to set aside his conviction also, a conviction obtained through the same denial of due process.

The Kings County Court found that Noia's conviction was manifestly unlawful and ordered it vacated. *People* v. *Noia*, 3 Misc. 2d 447, 158 N. Y. S. 2d 683 (County Ct. 1956). The State appealed to the Appellate Division, Second Department, where the decision of the County Court was reversed 4 App. Div. 2d 698, 163 N. Y. S. 2d 796 (1957). In a memorandum opinion the Appellate Division unanimously held:

> "It was error to vacate the judgment. The respondent's contentions with respect to the illegality of his conviction involve matters which could have been adequately reviewed on appeal from the judgment of con- [fol. 84] viction. No appeal was taken. This being so,

the court was without authority to grant the application (People v. Sadness, 300 N. Y. 69, 89 N. E. 2d 188; People v. Russo, 284 App. Div. 763, 135 N. Y. S. 2d 475; People v. Palumbo, 282 App. Div. 1059, 126 N. Y. S. 2d 381)." 163 N. Y. S. 2d 796, 797.

Noia, in turn, appealed to the New York Court of Appeals, which unanimously affirmed the Appellate Division. *People* v. *Noia*, *reported sub nom.*, *People* v. *Caminito*, 3 N. Y. 2d 596, 170 N. Y. S. 2d 799, *cert. denied*, 357 U. S. 905 (1958). Relying upon *People* v. *Rizzo*, 246 N. Y. 334, 339, 158 N. E. 888, 890, 55 A. L. R. 711 (1927), the Court of Appeals held that Noia's failure timely to appeal from his conviction precluded him from obtaining the post-conviction relief he sought. The court went on to discuss the revitalization in New York of the extraordinary writ of *coram nobis*, see *Lyons* v. *Goldstein*, 290 N. Y. 19, 47 N. E. 2d 426, 146 A. L. R. 1422 (1943), and pointed out that, even though the scope of that common law writ had been somewhat expanded beyond its original office by the New York courts, it was still only usable in New York for the purpose for which it was initially designed, that of presenting facts to the court of which the court was not aware at the time of the judgment sought to be vacated. 3 N. Y. at 601, 170 N. Y. S. 2d at 804. Therefore, since the ground upon which Noia sought to have his conviction set aside was apparent on the record at the time when he could have appealed, no post-conviction remedy was available to him. This was held to be so, even though the convictions of Caminito and Bonino had been vacated, the former by action of a federal court after Caminito had fully prosecuted his appeal through the New York State Courts, and the latter by a reversal upon reargument in the New York [fol. 85] Court of Appeals itself. 3 N. Y. at 600, 170 N. Y. S. 2d at 803.[2]

After this adverse decision by the highest court of New York and the subsequent denial of his petition for a writ

[2] Compare *People* v. *Boundy*, Dkt. No. 331, New York Court of Appeals 1962, with *People* v. *Codarre*, 10 N. Y. 2d 361 (1961).

of certiorari in the U. S. Supreme Court, Noia petitioned the U. S. District Court for the Southern District of New York for a writ of habeas corpus in order to present to a federal court his claim that he was convicted without due process of law. Before a federal district judge could consider the merits of relator's application, Noia had to satisfy the threshold requirement set forth in 28 U. S. C. §2254 (1958), which provides that:

> §2254. State custody; remedies in State Courts
>
> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The purport of the statute was exhaustively considered by the district judge who, in a written opinion, reported at 183 F. Supp. 222, concluded that a study of the authori- [fol. 86] ties required that the statute be interpreted so as to foreclose any petitioner who had exhausted all presently available state remedies from obtaining habeas corpus relief if he had failed to pursue a previously available state remedy during the time when that remedy had been available to him. Inasmuch as Noia had not timely appealed his conviction when he could have done so, and inasmuch as the New York courts as a result of this delinquency had subsequently dismissed his latterly-brought *coram nobis* proceeding without reaching the merits of his constitutional claims, the federal district judge concluded that Noia had not exhausted his state remedies as required by the statute. In an effort to justify the failure timely to appeal his conviction relator asserted that he did not then

appeal because he had no funds and he did not wish to cause his family further expense. The warden's evidence tended to indicate that Noia had not appealed for fear that upon a retrial he might receive the death penalty. The court held relator's explanation insufficient to excuse the procedural omission and so reluctantly dismissed relator's habeas corpus petition. He found it unnecessary to make any findings with reference to the warden's suggestion. The judge recognized that it was clear that Noia, like Caminito and Bonino, could not have been convicted except for the introduction at trial of the coerced confession, and he found that Noia was being held in a "patently unconstitutional detention," 183 F. Supp. at 225, and that prior to trial Noia had been subjected to precisely the same coercion as were his two codefendants, who, though convicted with him, were now "virtually scot free." 183 F. Supp. at 227.

WAIVER

The first question before us is whether, inasmuch as his conviction was not appealed, Noia waived his undeni- [fol. 87] able constitutional right of being tried without his coerced confession in evidence. The answer to this question is to be determined according to federal law. The issue of whether there has been a waiver of a federal right is to be federally determined, even if the alleged waiver is the failure to take a particular state procedural step. See *Rice* v. *Olson*, 324 U. S. 876 (1945); *Davis* v. *O'Hara*, 266 U. S. 314 (1924); cf. *Dice* v. *Akron, C. & Y. R.R.*, 342 U. S. 359 (1952). The Supreme Court has said that waiver is ordinarily "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). The highest Court has instructed us to indulge all reasonable presumptions against the waiver of a fundamental constitutional right. *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393 (1937); *Hodges* v. *Easton*, 106 U. S. 408, 412 (1883). As was said in *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U. S. 292, 307 (1937), "We do not presume acquiescence in the loss of fundamental rights." We must apply these principles to Noia's case.

Sometimes, it is true, courts have said that a litigant has "waived" a right in circumstances where it is obvious that a known right was not intentionally abandoned within the standard announced in *Johnson* v. *Zerbst*, *supra*. In some instances, we fear, "waiver" has been misused and abused, twisted and tortured, in order either to dispose of a bothersome factual ambiguity or to reach results that would have been more accurately supportable upon other grounds. See Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1333 (1961). It can truly be said that in such cases the term "waiver" is used to describe, rather than to explain, the result reached. We do not wish to fall into this intellectual trap. If the term "waiver" does indeed identify some legal concept relevant to the case before us other than that defined in *Johnson* v. *Zerbst*, it must be contained within one [fol. 88] of those combinations where law is applied to fact which it is more suitable to discuss below under a different conceptual label.

We turn to a consideration of whether Noia waived his constitutional right within the ambit of the term as it was defined in *Johnson* v. *Zerbst*. It would seem that a conscious and willing failure to appeal could indeed be a form of waiver. *Brown* v. *Allen*, 344 U. S. 443, 503 (1953) (opinion of Frankfurter, *J.*); cf. *Frank* v. *Mangum*, 237 U. S. 309, 343 (1915). If a convicted defendant is clearly apprised of a violation of his constitutional rights and of the procedure available to him for vindicating those rights, and if he is under no unfair restraint preventing this vindication, his failure to employ that procedure can be said to be an intentional relinquishment of a known right. *But see* Reitz, *supra*, at 1335.

It has been asserted that a defendant cannot waive those rights without enforcement of which the proceedings against him would be fundamentally unfair. Reitz, *supra*, at 1333. Among such non-waivable rights would be the right to be tried by an impartial tribunal, the right to be tried by a court free from mob domination—and the right not to be convicted solely upon the basis of a coerced confession. Perhaps Mr. Justice Frankfurter was referring to this concept of non-waivable rights when he said:

> Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial, *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank* v. *Mangum*, 237 U. S. 309, 343. When a State insists that a defendant be held to [fol. 89] his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. See *Adams* v. *United States ex rel. McCann*, *supra*, at 274. Compare *Sunal* v. *Large*, 332 U. S. 174, with *Johnson* v. *Zerbst*, 304 U. S. 458, 465-469. *However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in Moore* v. *Dempsey*, 261 U. S. 86. (Emphasis added.)
>
> *Brown* v. *Allen*, *supra*, at 503.

Be that as it may, adopting, as the Supreme Court has instructed us, all reasonable inferences against Noia's having waived a fundamental constitutional right, we conclude that relator did not waive his right under the Fourteenth Amendment not to be tried and convicted solely upon his coerced confession. At the time Noia made his choice not to appeal, he had just been convicted by a New York court and jury solely upon the confession which had been wrung from him. But it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment. The police at the trial only admitted to extracting his acknowledgment of guilt by methods far more subtle than brute force.[3] And even if Noia had suc-

[3] In denying the writ in the habeas corpus proceeding brought by Noia's codefendant Caminito, the district judge set forth these facts:

[fol. 90] ceeded in obtaining a reversal, he faced the possibility of a new trial in which he might be convicted again and receive the death penalty instead of life imprisonment. He had just received very shoddy treatment at the hands of the New York police—treatment that he then believed was approved by judicial authorities. Why should he expect a better brand of justice from the same authorities in the future? The posture of his case was far different immediately following the trial than it is now as a result of the intervening events which we have outlined above. We cannot believe that Noia would consciously and willingly have surrendered his constitutional right had he known then what he knows now: that there had been an undoubted violation of this right and the rectification of the wrong done him would mean his freedom, not his death. Perhaps Noia should be denied relief for some other reason, which we will discuss presently, but surely not because of any conscious or intentional waiver on his part of a right known to him to have his conviction set aside because that conviction had been obtained by depriving him of a constitutional right.

Exhaustion of State Remedies

We must now inquire whether relator's failure to appeal his conviction precludes him from relief under the Great

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Of course, there are many factors that are disturbing and cause suspicion. The holding of the defendants incommunicado, the sleeping on a hard bench without pillow or blanket in a cell probably not overheated, the failufe to arraign without unnecessary delay as provided by law, the admittedly false identifications, the intensive questioning by relays of detectives—this combination together with the fact that the relator had never been arrested or convicted, would cause hesitation and suspicion on my part. So would the fact that there is little, if any, independent evidence connecting the relator with the commission of the crime. However, the same feelings must have been in the minds of the jurors and they decided the issue in favor of the People after a complete, informative, detailed and conscientious charge.

United States ex rel. Caminito v. *Murphy*, 127 F. Supp. 689, 691-692 (1955).

The unconstitutionality of the treatment accorded the three defendants was not established until Caminito appealed the denial of the writ to our court. 222 F. 2d 698 (2 Cir. 1955).

[fol. 91] Writ because of the requirement in 28 U. S. C. §2254, quoted above, that a petitioner exhaust his state remedies before seeking federal habeas corpus. In so doing it will be helpful to review the applicable legal history.

Until the year 1867 habeas corpus in the federal courts was, except for rare instances, only available to those detained in federal prisons. In that year, however, as part of its Reconstruction legislation, Congress provided that the United States courts could grant this writ in "all cases where any person may be restrained of his * * * liberty in violation of the constitution, or of any treaty or law of the United States * * *." 14 Stat. 385. With only slight changes in language this statute has come down to the present day as 28 U. S. C. §2241. This legislation gave the lower federal courts a broad jurisdiction to inquire into the constitutionality of the detention of any prisoner incarcerated pursuant to a conviction in a state court. *Ex parte Royall*, 117 U. S. 241, 247 (1886).

But in applying the statute the federal courts were hesitant to reopen matters that had been fully litigated in the state trial and state appellate courts. It was not generally accepted until well into this century that the federal habeas corpus court had the duty to make an independent review of the details of the procedure accorded the defendant in the state court in order to determine whether he had received due process of law there as required of the states by the Fourteenth Amendment. As late as 1915 the Supreme Court sanctioned a district court's refusal to inquire into the merits of an allegation of mob domination at the relator's trial because the state courts had reviewed this issue fully, first on the defendant's motion for a new trial and again on appeal to the state supreme court. *Frank* v. *Mangum*, 237 U. S. 309 (1915). A similar approach had been taken by the Court in *In re Wood*, 140 U. S. 278, 287 (1891) (alternative holding).

[fol. 92] Eight years after the decision in *Frank* v. *Mangum*, however, in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), the Supreme Court clearly recognized the duty of a federal judge to determine for himself whether the petitioner was

convicted pursuant to due process of law.[4] Again the allegation was mob domination. The Court stated:

> We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts have failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.
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> • • • We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. Id. at 91, 92.

Ever since that momentous decison the Supreme Court has continued to subject the administration of state crim- [fol. 93] inal justice to the independent inquiry of federal courts pursuant to a petition for habeas corpus. E.g., *Mooney* v. *Holohan*, 294 U. S. 103 (1935), *Brown* v. *Allen*, 344 U. S. 443 (1953). And, through the years, in this review of state trials, the United States courts have developed an ever expanding concept of due process. See *Darr* v. *Burford*, 339 U. S. 200, 221 (1950) (Frankfurter, *J.*, dissenting), Reitz, *supra*, at 1329.

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[4] The abrupt change in the treatment of habeas corpus cases since the opinion in *Frank* v. *Mangum*, rendered in 1915, may have been a result of the statute enacted in 1916, limiting the appellate jurisdiction of the Supreme Court over state court decisions. 39 Stat. 726; Reitz, *supra*, at 1328. No longer could all defendants alleging unconstitutional infirmities in their trials in state courts bring their claims as a matter of right to the highest court.

Meanwhile, the federal courts in habeas corpus cases were also developing another theory, this one being calculated to reduce the instances of federal habeas corpus review of state convictions. This was the requirement that a prisoner incarcerated pursuant to a state conviction exhaust his available state remedies before he seek relief under federal habeas corpus. Nineteen years after the passage of the habeas corpus statute which was to become 28 U. S. C. §2241, the Supreme Court handed down the first opinion expounding the requirement that a habeas corpus petitioner first exhaust his state remedies. *Ex parte Royall* 117 U. S. 241 (1886). In that case it was held that the federal court in its discretion might withhold the federal writ when the defendant sought it before his trial in the state court. See also *United States ex rel. Drury* v. *Lewis*, 200 U. S. 1 (1906). By way of dictum in the *Royall* case, the Court also recognized that, even when federal habeas corpus was sought after trial in the state court, the federal court could, in the proper exercise of its discretion, withhold the writ so as to require the petitioner to carry his case through the state appellate system and thereafter to bring a writ of error in the U. S. Supreme Court. In accordance with this dictum the Court, that same term, denied an original petition brought after trial but before the petitioner had appealed to the state supreme court. *Ex parte Fonda*, 117 U. S. 516 (1886). The United States Supreme Court found no obstacle preventing the defendant [fol. 94] in that case from first appealing to the highest court of the state and then, if the ultimate state decision were adverse, seeking review of that court's determination by writ of error. Other cases in which the Court placed a similar duty upon the defendant were *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13 (1925); *In re Wood*, 140 U. S. 278, 289-90 (1891) (alternative holding); *In re Frederich*, 149 U. S. 70 (1893); *New York* v. *Eno*, 155 U. S. 89 (1894); *Whitten* v. *Tomlinson*, 160 U. S. 231 (1895); *Baker* v. *Grice*, 169 U. S. 284 (1898); *Tinsley* v. *Anderson*, 171 U. S. 101 (1898); *Davis* v. *Burke*, 179 U. S. 399 (1900); *Urquhart* v. *Brown*, 205 U. S. 179 (1907); cf. *Riggins* v. *United States*, 199 U. S. 547 (1905); *Glasgow* v. *Moyer*, 225 U. S. 420 (1912).

In *Mooney* v. *Holohan*, 294 U. S. 103 (1935), the Supreme Court added a further requirement to that of fully carrying forward a state appeal, the requirement that, before seeking relief under federal habeas corpus, a petitioner exhaust the collateral remedies still open to him in the state courts, such as the state writ of habeas corpus. See also *Ex parte Hawk*, 321 U. S. 114 (1944) (*per curiam*); *Ex parte Botwinski*, 314 U. S. 586 (1942); *Ex parte Davis*, 317 U. S. 592 (1942). And the necessity of appealing from the denial of any of these state collateral remedies before bringing a petition for federal habeas corpus was announced in *Ex parte Davis*, 318 U. S. 412 (1943) (*per curiam*).[5]

The Supreme Court recognized, however, that exceptional cases might be presented in which the petitioner's [fol. 95] duty to exhaust available state remedies would be excused and the federal court could forthwith entertain the petition for the Great Writ. Such was the famous case of *In re Neagle*, 135 U. S. 1 (1890). The petitioner there, a United States marshal, was imprisoned by the sheriff of San Joaquin County, California, on a charge of murder, because he had shot and killed one David S. Terry in the performance of the marshal's federally imposed duty to protect the life of Mr. Justice Field of the United States Supreme Court. Neagle sought release under the federal writ well in advance of trial in the state court. Counsel for the State of California asserted that an issuance of the writ of habeas corpus would deprive the state of its right to try the defendant for the crime charged. The Supreme Court (Field, *J.*, not sitting), nevertheless affirmed the United States Circuit Court for the Northern District of California, which had issued the writ of habeas corpus and had ordered the discharge of the prisoner. *In*

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[5] Apparently it was only necessary for the incarcerated defendant to apply for one post-conviction remedy even if several were available in the state system, and he did not have to make repetitious applications for the same remedy even though this was permitted under state law. See *Brown* v. *Allen*, *supra*, at 448-50 & n. 3. However, he was required to seek direct review of his conviction in the United States Supreme Court. See *Darr* v. *Burford*, 339 U. S. 200 (1950). *But see Wade* v. *Mayo*, 334 U. S. 672 (1948).

re Lonely, 134 U. S. 372 (1890) was another exceptional case. There also the petitioner was discharged under the Great Writ from state detention before trial. The defendant was incarcerated awaiting trial in a state court on a charge of perjury in that he allegedly gave false testimony before a notary public regarding the contested election of a member of Congress. In upholding an issuance of the federal writ, the Supreme Court held that the state court had no jurisdiction to entertain an action so inseparably connected with the functioning of the National Government. Another case of the exceptional type was *Wildenhus's Case*, 120 U. S. 1 (1887). In that case the Court, upon a petition for federal habeas corpus prior to trial in the state court, decided the question whether the arrest of a foreign crewman by state officers was contrary to the provisions of a treaty between this country and the Kingdom of Belgium. The Court held that the arrest did not

tional character of these three cases, which permitted the [fol. 96] violate the treaty. It has been said that the excep-by-passing of the state remedial processes, was that they involved either the operations of the federal government or its relations with other nations. *Whitten* v. *Tomlinson*, *supra*, at 241.

In 1944 in the well-known *per curiam* opinion of *Ex parte Hawk*, 321 U. S. 114 (1944), the Supreme Court set forth the exhaustion doctrine as it stood at the end of its pre-statutory development. The Court stated:

> Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. 321 U. S. at 116-17.
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> But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan*, *supra*, 115, or because in the particular case the remedy afforded by

> state law proves in practice unavailable or seriously inadequate, cf. *Moore* v. *Dempsey*, 261 U. S. 86; *Ex parte Davis*, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless. 321 U. S. at 118.

See, also, *White* v. *Ragen*, 324 U. S. 760, 767 (1945); *Marino* v. *Ragen*, 332 U. S. 561, 564 (1947) (Rutledge, J., concurring); *Wade* v. *Mayo*, 334 U. S. 672, 679 (1948); *Young* v. *Ragen*, 337 U. S. 235, 238 (1949); *Darr* v. *Burford*, 339 U. S. 200 (1950).

[fol. 97] As part of the recodification of the Judicial Code in 1948 Congress added section 2254, quoted above, which gave statutory recognition to the exhaustion doctrine as it had been developed in the case law. The statutory reviser's notes acknowledged:

> This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hayk*, 1944, 64 S. Ct. 448, 321 U. S. 114, 86 L. Ed. 572.)

H. R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947); see *Young* v. *Ragen*, *supra*, at 238 n. 1; *Darr* v. *Burford*, *supra*, at 210-211; *Irvin* v. *Dowd*, 359 U. S. 394, 405 (1959). See also S. Rep. No. 1559, 80th Cong., 2d Sess. 9 (1948); *Hearings on H. R. 3214 Before a Subcommittee of the Senate Judiciary Committee, 80th Cong., 2d Sess.* 28 (1948).

In the light of the case law incorporated into the statute, does Noia's failure to appeal preclude him from federal habeas corpus relief because of the exhaustion requirement in section 2254? The language of that section appears only to require a state prisoner to exhaust those state remedies presently open to him before seeking federal habeas corpus. It does not suggest that federal habeas corpus relief has been forfeited because of a failure to utilize some state remedy available in the past but which is no longer available. The statute speaks of "remedies available in the courts of the State," "an absence of available State corrective process or the existence of circumstances rendering such process ineffective," and "if he has the right under the law of the State to raise, by any available procedure, the question presented."

The Supreme Court did not announce a concept of forfeiture in the case law development of the exhaustion doctrine. In the leading case of *Mooney* v. *Holohan*, *supra*, the Supreme Court declared:

> [fol. 98] We do not find that petitioner has applied to the state court for a writ of *habeas corpus* upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. 294 U. S. at 115.

And in *Ex parte Hawk*, *supra*, the case heralding section 2254, it seems clear that the Court was referring to currently available remedies, not a forfeiture of the petitioner's right to federal habeas corpus for failing to resort to previously available state remedies. In that case it was stated:

> But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge.
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> * * * * *
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> Until [coram nobis in the state courts] has been sought without avail we cannot say that petitioner's state remedies have been exhausted.
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> * * * * *
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> As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion. 321 U. S. at 116, 118.

Noted authority has maintained that in every case in which the Supreme Court upheld a dismissal of the writ because of a failure to exhaust state remedies, a state remedy was available at the time the prisoner sought federal habeas corpus. But see *Ex parte Spencer*, 228 U. S. 652, 660 (1913). It is conceded, however, that a forfeiture, to which the Supreme Court never alluded in any of its opinions, might [fol. 99] have resulted, in some cases, through the running

of the period for the alternative remedy during the pending habeas corpus proceedings. Hart, *The Supreme Court, 1958 Term: Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 113 n. 85 (1959).

Judge Parker, the Chairman of the Judicial Conference Committee that drafted the Habeas Corpus Act of which section 2254 was a part, has disclosed that the purpose of the section was to foreclose resort to federal habeas corpus only when relief was still available in the state system. He said the following:

> One of the incidents of the state remedy is [the] right to apply to the Supreme Court for certiorari. If a petitioner has failed to make such application after the refusal of the state court to release him, he cannot be said to have exhausted the remedies available to him under state procedure, *provided he has the right to apply again to the state courts for relief as a basis for application to the Supreme Court for certiorari.*.
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> * * * * *
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> The fact that certiorari from the Supreme Court to the state court may be called a federal remedy is not determinative of the question here involved. *The crucial matter is that petitioner still has a right to attack in the courts of the state the validity of his conviction and, upon the record made in such attack, to petition the highest court of the land for a review. So long as such right remains*, he does not have, and ought not have, the right to ask a review by one of the lower federal courts. (Emphasis added.)
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> Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 177 (1949), quoted in *Darr* v. *Burford*, *supra*, at 212, n. 34.

[fol. 100] It is plausible to interpret the doctrine of exhaustion of state remedies simply to mean that when both the state and the federal courts are available to a particular state prisoner he should go into the state court first. See Hart, *supra*, at 113. If such is the proper interpretation, section 2254 is no bar to Noia's present petition for federal

habeas corpus. He has exhausted the only remedy in the state courts currently available to him, a proceeding in the nature of *coram nobis*.[*]

But we cannot assert with confidence that section 2254 only refers to present state remedies. Language in certain recent Supreme Court decisions indicates that interpreting the section to apply only to the exhaustion of presently available remedies would be erroneous. *Irvin* v. *Dowd*, 359 U. S. 394, 404-06 (1959); *Daniels* v. *Allen*, reported *sub nom. Brown* v. *Allen*, 344 U. S. 443, 486 (1953). See also *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (2 Cir. 1957). Assuming that section 2254 does indeed express a forfeiture of federal habeas corpus protection as a result of a past failure to utilize a particular state remedy, Noia would still go free, if his case is sufficiently exceptional. The statutory section attempted only to codify the existing law of exhaustion developed by the courts. As we pointed out earlier, the pre-statutory case law on exhaustion did not provide a rigid bar to habeas corpus relief; rather, it recognized exceptional situations permitting the immediate issuance of the federal writ. The language of the statute contemplates that such unusual circumstances can occur when it speaks of "circumstances rendering [state] process ineffective to protect the rights of the prisoner." We quote from the Supreme Court's opinion in *Darr* v. *Burford*, *supra*:

> [fol. 101] *Ex parte Hawk* prescribes only what should "ordinarily" be the proper procedure; all the cited cases from *Ex parte Royall* to *Hawk* recognize that much cannot be foreseen, and that "special circumstances" justify departure from rules designed to regulate the usual case. The exceptions are few but they exist. Other situations may develop. Compare *Moore* v. *Dempsey*, 261 U. S. 86. Congress has now made statutory allowance for exceptions such as these, leaving federal courts free to grant habeas corpus when there

[*] Although Noia could apply again for *coram nobis* relief in the New York courts, he is not required to do so before seeking federal habeas corpus. See footnote 5, *supra*, *Brown* v. *Allen*, *supra*, at 448-50 & n. 3.

> exist "circumstances rendering such [state] process ineffective to protect the rights of the prisoner." 28 U. S. C. §2254. 339 U. S. at 210.

The Court in *Frisbie* v. *Collins*, 342 U. S. 519 (1952) likewise recognized the possibility of unusual circumstances allowing a by-passing of the state channels of review. Mr. Justice Black stated for a unanimous Court:

> As explained in *Darr* v. *Burford*, 339 U. S. 200, 210, this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals. 342 U. S. at 520-21.

We believe that if there are facts in a case so unique as to make an independent state ground of decision, elsewhere reasonable and adequate, inadequate in that particular case to bar federal habeas corpus, those facts are likewise sufficient to create an exceptional case within the contemplation of section 2254 so as to permit the issuance of the federal habeas corpus writ. Therefore, we have postponed a discussion of the exceptional nature of Noia's case until our [fol. 102] consideration of the adequate and independent state ground concept, a concept particularly involved here, and which we now discuss.

THE INDEPENDENT AND ADEQUATE STATE GROUND OF DECISION

The presence of an independent and adequate state ground for the decision supporting Noia's detention would be sufficient basis for depriving him of his freedom quite apart from the federal Habeas Corpus Act or any other federal statute. The concept of the independent and adequate state ground originated in cases involving direct review of state court decisions by the United States Supreme Court. *Murdock* v. *Memphis*, 87 U. S. (20 Wall.) 590, 634-636 (1875).[7] In dealing with this concept upon

[7] Mr. Justice Frankfurter, dissenting in *Irvin* v. *Dowd*, *supra*, said of the Murdock opinion:

direct review by the U. S. Supreme Court of a state decision, where the decision of the highest state court rests upon two grounds, one federal, the other non-federal, the Supreme Court has taken the position that it is pointless for it to pass on the federal issue inasmuch as the result reached by the state court can stand inviolate on the state ground regardless of the outcome reachable on the federal point.[7] It would be a clear infringement of state prerogatives [fol. 103] for the U. S. Supreme Court to ignore the state ground and to command the result which would have been followed had there just been a federal question in the case. By an "independent" state ground is meant one in which no elements of federal law are present. The state ground in the present case, failure to appeal, is clearly an independent grounds; therefore we shall not concern ourselves further with this requirement.[8] But the meaning of the requirement that the state ground be "adequate" is crucial to our analysis of the present case and will be discussed at greater length below. To illustrate the doctrine of an independent and adequate state ground in the

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This decision has not unjustifiably been called one of "the twin pillars" (the other is *Martin* v. *Hunter's Lessee*, 1 Wheat. 304) on which have been built "the main lines of demarcation between the authority of the state legal systems and that of the federal system." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 503-504 (359 U. S. at 408).

[8] The formulation of the Court in *California Powder Works* v. *Davis*, 151 U. S. 389, 393 (1894) has become classic:

> It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented.

[9] For a case involving a non-independent state ground, see *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921).

sphere of direct federal review, let us suppose that the highest state court holds a contract to be void for lack of consideration and invalid because it violates the Sherman Anti-Trust Act. The Supreme Court would decline to review the federal anti-trust question because the result reached by the state courts is fully supportable on the non-federal ground of lack of consideration. Cf. *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935).

The next step in our analysis is to recognize that the state ground that is independent and adequate need not be a substantive law ground, but can be a rule of state procedure. See, e.g., *Herndon* v. *Georgia*, 295 U. S. 441 (1935). In most cases a failure to raise or preserve federal questions in accordance with the established state procedure will result in a loss of the right to present these [fol. 104] issues to the U. S. Supreme Court because federal review of federal issues is cut off by an independent and adequate state *procedural* ground for decision. E.g., *Edelman* v. *California*, 344 U. S. 357 (1953). For example, if a party fails to appeal from an adverse judgment within a certain time limit that judgment will become final as a matter of state procedural law. If despite failure timely to appeal the losing litigant nevertheless seeks review in the U. S. Supreme Court, that Court will probably answer him that regardless of his federal contentions, the result in the trial court must stand because of the state rule of procedure. As is true for state substantive rules, of course the state procedural rules have to meet the requirement of adequacy if they are to cut off Supreme Court determination of the federal issues.

With this background of the application of the doctrine in cases of direct review, we move to its relevance in federal habeas corpus proceedings. *Daniels* v. *Allen*, *supra*, at 482-86 instructs us that the doctrine also applies in habeas corpus cases. Mr. Justice Frankfurter, dissenting in *Irvin* v. *Dowd*, *supra*, stated the same proposition, and none of the Court disagreed.

> The problem presented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism. It concerns the relation

> of the United States and the courts of the United States to the States and the courts of the States. The federal judiciary has no power to sit in judgment upon a determination of a state court unless it is found that it must rest on disposition of a claim under federal law. This is so whether a state adjudication comes directly under review in this Court or reaches us by way of the limited scope of habeas corpus jurisdiction originating in a District Court. 359 U. S. at 407-408.

[fol. 105] As we see, the concept is just as important in cases of federal habeas corpus for state prisoners as it is when there is direct federal review of state court decisions. Just as it would be an encroachment on the prerogatives of the state for the Supreme Court upon direct review to disregard the state ground, equally—if not more so—would it be a trespass against the state for a lower federal court, upon a petition for habeas corpus, to disregard the state ground in granting relief to the prisoner. This is our federal system in operation. In such a system certain matters are reserved for governance by the states, other matters are to be determined according to federal law. And in such a system of government, where two sovereignties function within the same territorial boundaries, cases, such as the present one, will inevitably arise in which the law of both governments will be relevant and will have to be accommodated.

Since we have shown that an adequate state ground of decision will preclude relief under federal habeas corpus, the question we must face is whether Noia's failure to appeal his conviction is a state procedural ground adequate to bar his path to freedom under the federal writ. This question of adequacy is one to be determined by federal law. *Staub* v. *Baxley*, 355 U. S. 313, 318-19 (1958); see *Rogers* v. *Alabama*, 192 U. S. 226 (1904). Actually, in describing the state ground, the term "adequate" embraces two dimensions of adequacy. First the state ground must be sufficiently broad-based to support the total result reached by the state court—here the relator's conviction and sentence. The state ground in the present

case clearly satisfies this part of the requirement of adequacy. The second part of the requirement is that the state ground be free from certain infirmities so that it will justify a foreclosing of consideration of the federal [fol. 106] issues involved in the case. This part of the requirement of adequacy is better understood through explanation than through definition. There are at least four ways in which the state ground can be considered inadequate, with the result that the federal court can consider the merits of the federal issue. First, if the state ground is interjected into a case and relied upon by the state court in order *to evade* the federal question, the state ground is inadequate. *Rogers* v. *Alabama*, *supra*, at 231 (1904); *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923); *Ellis* v. *Dixon*, 349 U. S. 458, 463 (1955); see *Atlantic Coast Line R.R.* v. *Mims*, 242 U. S. 532 (1917). There is no suggestion here that the state, by relying upon the defendant's failure to appeal his conviction, was doing so in order to evade its obligations under federal law. Second, if the state rule were applied so as *to discriminate* against this particular prisoner, we could say that the state ground for decision was inadequate. *Cf.* Reitz, *supra*, at 1337 n. 86, 1341. But no discrimination has been practiced here, as any other prisoner who did not appeal would also be barred from relief. Third, if the state rule in question were found by the federal court *not to have fair and substantial support* in state law, the rule could be termed inadequate. *Staub* v. *Baxley*, 355 U. S. 313 (1958); *Ward* v. *Board of County Comm'rs*, 253 U. S. 17, 22 (1920); see *Patterson* v. *Alabama*, 294 U. S. 600, 604-05 (1935). But there appears to be sufficient support for the state rule in this case. See *People* v. *Rizzo*, 246 N. Y. 334, 158 N. E. 888 (1927); *People* v. *Sadness*, 300 N. Y. 69, 89 N. E. 2d 188, *cert. denied*, 338 U. S. 952 (1950); *People* v. *Kendricks*, 300 N. Y. 544, 89 N. E. 2d 257 (1949). Finally, even if there is no intention to evade the rights of the prisoner guaranteed to him by federal law, but the state procedural rule never- [fol. 107] theless *is an unreasonable bar* to the effectuation of federal rights, the Supreme Court has declared the state ground must not prevail. *Davis* v. *Wechsler*, 263 U. S. 22 (1923); *Williams* v. *Georgia*, 349 U. S. 375, 399 (1955) (dis-

senting opinion); see *Michel* v. *Louisiana*, 350 U. S. 91 (1955); *National Mutual Bldg. and Loan Assoc.* v. *Brahan*, 193 U. S. 635 (1904); cf. *Ellis* v. *Dixon*, 349 U. S. 458, 463 (1955). However, in the general run of cases no state rule of procedure is more reasonable or fair than that a conviction becomes final upon the defendant's failure to appeal, provided, of course, that he was under no handicap at the time of his conviction which prevented him from noting the appeal.

Thus we come to the last scene in this human drama. Is there an adequate state ground in this case dooming relator to life imprisonment? Our answer is No: the state ground here is inadequate. We must realize that adequacy is a term of relativity. No state ground is entitled to unqualified deference. As we noted in the last paragraph, for the state ground to be adequate, it must be reasonable.

Earlier in the opinion we pointed out that the Supreme Court in habeas corpus cases has consistently recognized that extraordinary circumstances might arise which would permit recourse to the federal writ even though certain state procedures were by-passed. We do not believe that the Court has expressed in those cases a closed list of exceptions. See *Frisbie* v. *Collins*, 342 U. S. 519, 520-21 (1952). We recall that the Court in *Darr* v. *Burford*, *supra*, said: "The exceptions are few but they exist. Other situations may develop." 339 U. S. at 210.

In determining whether the relevant state ground is a reasonable bar to federal rights—or whether the case is sufficiently exceptional so as to excuse an earlier omission of a state procedure—the federal court should consider [fol. 108] the clarity and the magnitude of the substantive federal right violated. The reasonableness, and hence the adequacy, of the state procedural bar, is inversely proportionate to the importance of the federal right and the clarity of its violation. Even in the case of *Frank* v. *Mangum*, *supra*, which in certain respects announced a very limited, now obsolete, scope for federal habeas corpus, the Court asserted:

> [T]he due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and

> not to matters of form or procedure; * * * it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not * * * 237 U. S. at 331.

We hasten to add that we are not suggesting that a district judge should make a full review of the substantive federal issue at the outset of each habeas corpus proceeding in order to determine the adequacy of a state ground which the state asserts to be present. Such an interpretation would make the concept of an adequate state ground meaningless in practice. We do assert, however, that if, as a result of a peculiar turn of events, it is obvious without detailed inquiry that a prisoner has been deprived of a significant federal right, the federal judge, in passing on the adequacy of an asserted state procedural bar, should give great weight to the clear violation of that federal right. Cf. *Darr* v. *Burford*, *supra*, at 202, 218. And if it should further appear without extended inquiry that [fol. 109] the vindication of the prisoner's significant federal right would be almost certain to result in his freedom instead of the long confinement to which he was sentenced, it would be difficult indeed to conceive of any procedural miscue great enough to justify the court's refusal to look at the posture of the substantive case. Let us consider the reason why a state procedural ground is entitled to the respect it receives. It is that the state has a right to administer its criminal justice in an orderly fashion. *Ex parte Spencer*, *supra*, at 660. This is to assure to the state and all the defendants on a crowded criminal docket that each case will be afforded fair, full, and equal treatment. Innocent defendants must occasionally suffer along with the guilty ones in order to support this end. The moving finger of criminal justice cannot be made to stop and re-examine the contentions of every convicted defendant, once he has placed himself outside the channels of a fair state

appellate review. If this were not so, the disruptions and confusion created by perpetual and irregular reconsideration of those claims would result in insufficient attention to the bona fide assertions of those who have complied with the procedural rules. It is not inconsistent with our notions of justice to let some innocent persons suffer for failure to be vigilant in the protection of their rights when we cannot identify who the innocent ones are. But when the unusual case arises in which at the very outset it is obvious that on the substantive merits, as distinct from the procedural lapse, the prisoner should not be imprisoned, and those merits are of constitutional magnitude, any explanation advanced for the purpose of justifying the prisoner's continued detention is much less convincing. But, as we pointed out above, fortunately the presence of an independent state ground is not always an absolute bar to the vindication of rights guaranteed [fol. 110] by the federal Constitution. Even in our federal form of government in which the states make their own rules of procedure, we do not lose sight of the fact that the purpose of all procedure is to determine and effectuate substantive rights, and not the reverse. There is no more unenlightened or cruel anachronism than an unbending reliance upon the niceties of procedure in derogation of substantive rights. Procedures exist or ought to exist for the purpose of effectuating rights, not of denying them. Cf. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 45, 51 (1939), *aff'd* 309 U. S. 390 (1940). When the substantive rights are clear, we should be most hesitant to sacrifice those rights on the altar of local practice.[10]

We consider the posture of Noia's case in the light of the principles discussed above. The right of the defendant to be tried without the introduction into evidence of a confession wrung from him against his will is a constitutional right of the greatest magnitude. In fact, since

[10] Cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (Holmes, *J.*):

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

the confession constituted the sole basis for conviction, it can be said that this unconstitutional deprivation presented "a substantial claim [going] to the very foundation of a proceeding." *Brown* v. *Allen*, 344 U. S. 443, 503 (1953) (opinion of Frankfurter, *J.*). And there is no doubt but that the confession of this prisoner was in fact coerced. We quote from the opinion of the district court below:

> [T]here is no proceeding available to him in the State, apart, of course, from executive clemency, which can [fol. 111] effect his release from a patently unconstitutional detention.
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> * * * * * *
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> Even a cursory reading of the opinion of the Court of Appeals for the Second Circuit in the Caminito case (222 F. 2d 698) indicates that all of the defendants were coerced, and the Court of Appeals of the State of New York in the Bonino case has recognized this (1 N. Y. 2d 752, 152 N. Y. S. 2d 298, 135 N. E. 2d 51). 183 F. Supp. at 225 & n. 3.

If it were not enough that this relator's present detention obviously rests upon a violation of his constitutional right to a trial by due process of law, it is also virtually certain that Noia would remain free if he were ever released. Often the setting aside of a prisoner's conviction because of trial defects merely results in a new trial in which he is convicted again under proper procedures; but the strange turn of events in this case appears to make it unlikely that relator would again be convicted. We quote again from the district judge:

> [M]y dismissal of the writ leaves one co-defendant incarcerated for the term of life imprisonment while the other two codefendants, convicted on the basis of precisely the same coercion, are virtually scot free.
>
> * * * * * *
>
> Even though Bonino and Caminito still remain under indictment it is most highly improbable that they will ever be tried again since the State presented no evidence but the presently unavailable coercion confes-

sions in 1942. The obtaining of new evidence would appear at this late date impossible. See People v. Caminito, 4 A. D. 2d 697, 163 N. Y. S. 2d 699, 183 F. Supp. at 227 & n. 6.

[fol. 112] The coincidence of these factors: the undisputed violation of a significant constitutional right, the knowledge of this violation brought home to the federal court at the incipiency of the habeas corpus proceeding so forcibly that the state made no effort to contradict it, and the freedom the relator's codefendants now have by virtue of their vindications of the identical constitutional right leads us to conclude that the state procedural ground, that of a simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate. The unique fact pattern in this case is such that few prisoners will find the release of Noia to have any applicability to their situations. Be that as it may, it still does not sit well on the consciences of civilized men that a man should spend the rest of his life in confinement when it is patent to all that the only reason for the detention is that he did not timely appeal his conviction.

We find no precedent that compels us to deny relator's petition. There are two leading cases in which the Supreme Court, because the petitioners failed to take certain steps in the state appellate process, has refused to consider their contentions upon habeas corpus that their convictions were unconstitutionally obtained. These cases are *Daniels* v. *Allen*, *supra*, and *Darr* v. *Burford*, *supra*. In the *Daniels* case the allegations of unconstitutional treatment embraced discrimination in the jury lists, coerced confessions, the procedure by which the state court determined the voluntariness of the confessions, and the refusal of the state court to entertain the relator's other constitutional claims. It was far from clear at the outset of the habeas corpus proceeding in that case that there was any merit in the relator's contentions. In fact, in the case of *Brown* v. *Allen*, decided contemporaneously with *Daniels* v. *Allen*, and ap-
[fol. 113] pealed from the same state, North Carolina, the

Supreme Court held that there was no unconstitutional discrimination in the selection of jury panels. Likewise, in *Darr* v. *Burford*, the merits of the relator's federal contentions had not been judicially examined or settled at the time of his habeas corpus petition, or even later. His contentions were lack of counsel and inability adequately to prepare his defense.

In a third case, *Michel et al.* v. *Louisiana*, *supra*, the petitioners alleged they had been denied due process because of the systematic exclusion of Negroes from the grand jury panels. A majority of the Supreme Court refused to consider this constitutional contention because each petitioner had failed, as required by a Louisiana statute, to file a motion in the state court challenging the composition of his particular grand jury before the third judicial day following the end of that grand jury's term. Though Mr. Justice Black, in dissent, announced that it was undisputed that only once in people's memory had a Negro ever been selected as a grand juror in the particular parish involved, this fact was not referred to in the majority opinion. *Michel* is distinguishable from our case, for in discussing the petition of one of the three defendants whose petitions were heard together, the majority of the Court stated that Louisiana had introduced at trial admissible evidence against the defendant which was likely to be unavailable to the state if a retrial were to be ordered. 350 U. S. at 99. In our case, on the other hand, the only evidence which the state put in or could have offered against Noia at the time of his trial, his coerced confession, was inadmissible.

The leading cases in which we of the Second Circuit have refused to entertain the relator's federal contentions because of a prior failure to pursue a complete journey [fol. 114] through the state appellate system were *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645 (2 Cir. 1960) and *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (2 Cir. 1957). In the *Williams* case the relator alleged a coerced confession, but it was no more than allegation in his petition when Williams sought federal habeas corpus. In *Kozicky*, similarly, the allegation was a coerced confession, but, likewise, there was no certainty at the outset

of the habeas corpus proceeding, as there is in the present case, that the relator there had truly been coerced.

On the other hand, we are led to conclude from our review of the cases in the U. S. Supreme Court in which it was obvious from the undisputed facts on appeal that an important federal right had been denied a defendant in a state court, and assertion was made that the defendant had not complied with applicable state procedure so as to avail himself of the federal right, the Supreme Court has not hesitated to afford some form of relief to the appellant.

Patterson v. *Alabama*, 294 U. S. 600 (1935), a case that reached the U. S. Supreme Court from a state supreme court on a writ of certiorari, involved facts very similar to those in the instant case. Patterson and one Clarence Norris, Negroes, were indicted and convicted of rape in an Alabama state court. Norris asserted a denial of the equal protection of the laws as guaranteed to him by the Fourteenth Amendment on the ground that Negroes had been systematically excluded from jury service. As Caminito, in the present series of cases, Norris properly preserved his Fourteenth Amendment objection through the state proceedings; and in *Norris* v. *Alabama*, 294 U. S. 587 (1935), the United States Supreme Court reversed his conviction because of this deprivation of his constitutional right. Meanwhile, Patterson was trying to assert the same [fol. 115] right. He had been tried separately from, but at the same time as, Norris, and upon the same facts. Thus, it was clear that Patterson, as Norris, had been denied his constitutional right to equal protection of the laws. But Patterson's attorney had not made a motion for a new trial or filed his bill of exceptions within the requisite time limits under Alabama law; and so the state supreme court refused to consider Patterson's contentions that his rights under the federal Constitution had been denied him. The U. S. Supreme Court dealt with whether these Alabama state procedural rules presented an adequate non-federal ground to sustain Patterson's conviction and foreclose adjudication upon Patterson's federal right. 294 U. S. a 602. Mr. Chief Justice Hughes, for a unanimous court, reversed the Alabama conviction and remanded the case

to the state courts. He emphasized the exceptional situation presented by a reversal of the conviction of Patterson's associate on constitutional grounds, a reversal that made it clear that Patterson too had been denied his constitutional right. The Court concluded that upon remand the state court might well hold that it had power to entertain Patterson's federal contentions. In the *Patterson* litigation the Supreme Court remanded for further state court consideration. Such a disposition was appropriate in that case. The remand secured the constitutional right to the petitioner with the slightest possible interference with the state's procedures.[11] Such a course is not open to us; we can only remand to the district court with instructions to issue the Great Writ. But the Supreme Court's opinion in [fol. 116] *Patterson* teaches us one important truth crucially relevant to the case before us. In passing upon the adequacy of a state procedural ground asserted as a bar to a federal adjudication upon a clear violation of a federal right, the Supreme Court will consider whether the alleged violation of the federal right has already been fully proved and therefore undeniably demonstrated.

A similar case was *Williams* v. *Georgia*, 349 U. S. 375 (1955), also before the Supreme Court through the grant of a writ of certiorari. After conviction for murder and while under sentence of death, the petitioner, a Negro, filed an extraordinary motion in the state trial court for a new trial on the ground of unconstitutional discrimination against Negroes in the selection of a jury panel, but the state courts refused to entertain the motion because the defendant had not objected to the jury panel before trial. However, six months before Williams' motion was filed in the Georgia court, the United States Supreme Court had decided another case in which it had declared that the method of selecting jury panels in Georgia was unconstitutional upon the ground asserted by Williams. *Avery* v. *Georgia*, 345 U. S. 559 (1953). In fact, upon oral argument before the U. S. Supreme Court in *Williams*, the state con-

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[11] Patterson was retried and, apparently with the constitutional defect cured, was again convicted. *Patterson* v. *State*, 234 Ala. 342, 175 So. 371 (1937).

ceded that Williams had been deprived of his constitutional right. Thus, the Supreme Court was again faced with the kind of problem presented in *Patterson*, on the one hand a clear violation of a constitutional right, but, on the other, a failure to follow one of the procedural rules of the relevant state. The Supreme Court concluded that it should pass upon the violation of the federal rights of the petitioner.

> We conclude that the trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his [fol. 117] motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us. 349 U. S. at 389.

Believing it wiser, however, to remand the case to the state courts for reconsideration of the procedural ground used there to bar petitioner, the Supreme Court followed a course similar to that which it followed in *Patterson* v. *Alabama*, *supra*. Initially in *Williams*, whether to grant the defendant's motion for a new trial was within the discretion of the Georgia trial court. And the Supreme Court decision in *Avery* was before that Georgia court when it first considered Williams' motion. But even though the state judgment was one within judicial discretion, and whether to exercise that discretion would normally have been strictly a matter of state procedural law, nevertheless, Mr. Justice Frankfurter, for the majority of the Supreme Court, announced that federal courts could entertain the federal issues.

Finally, we mention *New York Cent. R.R.* v. *New York and Pa. Co.*, 271 U. S. 124 (1926). In that case the Public Service Commission of Pennsylvania held that the railroad had excessively charged the shipper and ordered the railroad to repay the amount of the excess. The Supreme Court of Pennsylvania affirmed the order and the railroad sought review by the U. S. Supreme Court. But under section

208(a) of the Transportation Act of 1920, 41 Stat. 464, it was obvious that this order was impermissible without the approval of the Interstate Commerce Commission, which had not been granted. Nevertheless, the shipper argued, and the state courts agreed, that the railroad had waived its rights under section 208(a) by not appealing a similar [fol. 118] earlier decision of the Public Service Commission to the Pennsylvania Supreme Court. Stressing the clarity of the substantive point, Mr. Justice Holmes for a unanimous Court reversed the judgment of the state court, thus vindicating the federal right despite the state procedural point.[12]

Conclusion

The importance of this litigation has led us to consider more than the single issue presented to us on appeal—that of the proper interpretation of the language of 28 U. S. C. §2254. This extraordinary case required an examination of the law involving not only the so-called "exhaustion of remedies" concept but also the other concepts present in this important and difficult area.

In the light of the authorities and the precedents, we find our duty clear.

The order of dismissal is reversed and the case remanded to the district court with instructions to issue the writ and to order that the prisoner's conviction be set aside and that he be discharged from custody unless forthwith accorded a new trial.

We are indebted to the Legal Aid Society and to its appellate counsel for a most able presentation in relator's behalf.

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[12] The earlier complaint did not result in a final order, and, therefore, could never have reached the U. S. Supreme Court for review. However, that litigation, although not involving a final order, was appealable to the state supreme court. It was the railroad's failure to appeal to the state court which presented the potential adequate state ground. The finality of the first proceeding before the state commission and their chances of reaching the U. S. Supreme Court could not have resolved the question whether the railroad's failure to appeal in the state system was an adequate ground of decision so as to cut off federal review of the federal issues.

[fol. 119] MOORE, *Circuit Judge* (dissenting):

The function of the federal courts in a habeas corpus proceeding brought to test a state court conviction challenged as invalid under the Fourteenth Amendment for want of due process is not to substitute their own conceptions of substantive and procedural justice for that of the state but rather to determine whether the state has denied the relator due process of law. Thus, attention must be concentrated upon those processes made available to relator by the state to assure him of adequate opportunities and facilities to claim and to have adjudicated his constitutional rights. The lengthy opinion of the majority, while paying occasional lip service to certain fundamental and well-established jurisdictional principles relating to federal review of state convictions, actually repudiates in radical fashion the very principles developed over the years by the Supreme Court. The doctrine now enunciated by the majority is that whenever a group of appellate judges wish to depart from previously settled principles, they may find that "extraordinary circumstances" exist and that such a finding entitles them to ignore on an *ad hoc* basis all otherwise applicable principles. Realizing that such a declaration has alarmist implications, it will be necessary to analyze the facts, the law and the majority opinion rather critically lest the cry of "wolf-wolf" rouse in vain those watchful of the administration of criminal justice.

On May 11, 1941, Noia, Bonino and Caminito were apprehended and thereafter charged with first-degree murder. Upon a jury trial, they were convicted. Clemency was recommended by the jury so that sentences of life imprisonment instead of death were imposed. Bonino and Caminito appealed through the state courts and sought certiorari from the Supreme Court which was denied. Noia, [fol. 120] the relator here, having been advised by counsel of his right to appeal, chose not to do so. On the habeas corpus proceeding, there was testimony given by Noia's trial counsel that Noia did not wish to risk an appeal which, if successful, might result in a re-trial upon which, if convicted, the death penalty might be imposed. Noia testified

that he had no funds to retain an attorney to prosecute an appeal and did not wish to put his family further into debt. The trial court made no findings on these factual issues.

As a result of the court proceedings set forth in the majority opinion, Bonino and Caminito find themselves relieved of their judgments of conviction because of decisions that coerced confessions were used against them. Quite naturally, Noia regrets his original decision not to appeal and, despite this failure, wishes to enjoy the same benefits as his former co-defendants. And so he now argues that, although he has knowingly and voluntarily failed to appeal and no longer has the right to appeal, he may still substitute federal habeas corpus for the state provided appellate procedure which he chose not to pursue.

Were such an argument to be accepted as sound, any defendant convicted in a State court after a trial, in which an allegedly coerced confession has been used and in which the question of coercion has been fairly submitted for jury determination, can in the event of an adverse decision obtain a new trial of the identical issue before a federal judge merely by allowing the time to appeal to elapse and then applying under Section 2254 for a federal writ. To the majority, such failure is without legal significance because it should "not sit well on the consciences of civilized men that a man should spend the rest of his life in confinement when it is patent to all that the only reason for the detention is that he did not timely appeal his conviction" (Maj. Op., p. 3135).

[fol. 121] In order to accomplish the result they desire, the majority have to find that Noia's right to habeas corpus was not barred by any one of three well-established rules of federal review: (1) that a party cannot seek to have a conviction set aside on the ground that his constitutional rights were violated if he has intentionally waived his right to assert that claim; (2) that federal habeas corpus is not available to state prisoners who have not exhausted their state remedies, 28 U. S. C. §2254; and (3) that state convictions are not subject to federal review if there is an adequate state ground which will sustain the conviction.

Thus, "The first question before us is whether inasmuch as his conviction was not appealed, Noia waived his un-

deniable constitutional right of being tried without his coerced confession in evidence". (Maj. Op., pp. 3109-10). In answering this question, the majority starts out by purporting to adhere to legal principles and by conceding that "waiver is ordinarily 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)." Next they recognize that, "It would seem that a conscious and willing failure to appeal could indeed be a form of waiver. *Brown v. Allen*, 344 U. S. 443, 503 (1953) (opinion of Frankfurter, J.)." Undisputedly Noia knew that a "coerced" confession had been used against him on his trial. His failure to appeal was "conscious and willing" enough. What better exercise of judgment than to exercise it in favor of saving his life. The majority "cannot believe that Noia would consciously and willingly have surrendered his constitutional right had he known then what he knows now:". Nor can I. What defendant would ever plead guilty or waive for good cause his right to appeal if he knew in advance that he would be acquitted or that his conviction would be reversed and the indictment dismissed. Never- [fol. 122] theless, the decision of the majority is that "relator did not waive his right under the Fourteenth Amendment not to be tried and convicted solely upon his coerced confession.", and that despite the adequacy of State appellate procedure, Noia was not required to use it because "it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment" (Maj. Op., p. 3112).

Since the question of whether Noia intentionally waived his right to claim that a coerced confession was used against him involved an issue of fact, it is not proper for the majority to substitute its speculation and its conclusions as to why Noia failed to appeal for the evidence actually presented to the district court and to formulate a judgment were based on facts now known rather than on the facts existing at the time of the conviction. As previously mentioned, in the hearing before the district court Noia's trial counsel testified for the state that Noia did not appeal because he feared that on retrial the death

penalty might be imposed. If we accept this as true, it is clear that Noia intentionally waived his right to claim that a coerced confession was used against him. Although this testimony was contradicted by Noia's testimony, the district court did not make any finding on this question because it believed that its decision on the §2254 issue made such a finding unnecessary. 183 F. Supp. at p. 225 n. 4. Thus, even if the majority were correct in holding that Noia's right to federal review was not barred because of a failure to exhaust state remedies or by an adequate state ground, this court should not order the district court to issue the writ because there is still a question of fact on the issue of waiver that must be decided by the district court.

The majority next turns to the question, "whether Noia's failure to appeal his conviction precludes him from relief [fol. 123] under the Great Writ because of the requirement in 28 U. S. C. §2254 * * * that a petitioner exhaust his state remedies before seeking federal habeas corpus." While recognizing that "language in certain recent Supreme Court decisions indicates that interpreting the section to apply only to the exhaustion of presently available remedies would be erroneous" (Maj. Op., p. 3123), the majority finds it plausible to interpret §2254 "simply to mean that when both state and federal courts are available to a particular state prisoner he should go into the state court first."

Since I believe that Noia is not entitled to federal habeas corpus because his conviction is supported by an adequate state ground which precludes federal review (to be discussed *infra*) and also because he probably waived his constitutional claim, there would be little to be gained from my setting forth extensively my views on whether §2254 applies to past as well as present state remedies although, in my opinion, a more reasonable reading of the statute would be one which would not permit a defendant to fail wilfully to avail himself of the due process which the state accords him and then claim exhaustion of remedy. However, since the majority have chosen to deal with this question at length, they should have given some consideration to the question, which will no doubt plague the district courts, namely, how does this decision affect our

prior ruling in *United States ex rel. Kozicky* v. *Fay*, 2 Cir., 1957, 248 F. 2d 520. In *Kozicky*, a case in which the defendant had failed to appeal to the New York Court of Appeals from a state court conviction, the author of the majority opinion in this case said (for a unanimous panel), "If the state provided such a remedy (i.e., an appeal) and the petitioners failed to take advantage of it, we hold they cannot obtain a writ of habeas corpus from a federal court. This result is a necessary consequence of 28 U. S. C. A. §2254." 248 F. 2d at 522. He continued, "But, where the [fol. 124] failure of a prisoner to obtain relief is due to his own inaction, 28 U. S. C. A. §2254 prohibits intervention by the federal courts." 248 F. 2d at 523. Does the majority wish to overrule *Kozicky* completely or would they hold that the decision was right but the reasoning was wrong? What of the statement in *Kozicky* that "it would be unseemly in our dual system of government for a federal district court to upset a state conviction without an opportunity to the state courts (sic) to correct a constitutional violation" (248 F. 2d at 523, quoting from *United States ex rel. Marcial* v. *Fay*, 2d Cir., 1957, 247 F. 2d 662)?

Lastly after conceding that "an adequate state ground of decision will preclude relief under federal habeas corpus," the majority pose the question: "Whether Noia's failure to appeal his conviction is a state procedural ground adequate to bar his path to freedom under the federal writ" (Maj. Op., p. 3128). Thus, the majority has "come to the last scene in this human drama" "dooming relator to life imprisonment." Legal principles having failed to produce the desired result, resort must be had to a *tour de force* by the fiat that "No state ground is entitled to unqualified deference" and "adequacy" in any event is but "a term of relativity." After all, "for the state ground to be adequate, it must be reasonable," and what could be more unreasonable than requiring a defendant to appeal?

From here on the denouement comes rapidly. The "simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate."

However, the adequate state ground doctrine, namely, that a federal court cannot consider the merits of a con-

stitutional claim alleged to invalidate a state conviction if that claim was not presented to the state courts by the use of all reasonable state procedures, cannot be disregarded [fol. 125] as easily as the majority assumes. As Mr. Justice Frankfurter said in reference to this doctrine:

> Something that goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut on the assumption that this Court has general discretion to see justice done. Nor is it one of those technical matters that laymen, with more confidence than understanding of our constitutional system so often disdain. [*Irvin* v. *Dowd*, 359 U. S. 394, 408, 1959 (dissenting opinion).][1]

The decision of the Supreme Court in *Daniels* v. *Allen*, *decided sub nom. Brown* v. *Allen*, 344 U. S. 443, 1953, clearly controls the issues in this case and requires affirmance of the dismissal of the writ. The petitioners in *Daniels* had made timely objection to the introduction in evidence against them of confessions which were alleged to have been coerced and had also made timely motions at their trial to quash the indictment and challenge the array, alleging discrimination against Negroes in the selection of the grand and petit jurors. On appeal, the Supreme Court of North Carolina refused to examine these constitutional claims because the statement of the case on appeal had been filed one day after the period of limitation for such service. After the Supreme Court had denied certiorari and the state court twice denied leave to apply for *coram nobis*, the petitions for habeas corpus were filed alleging the use of a coerced confession and discrimination in the selection of the grand and petit jurors. The Supreme Court in affirming the denial of the writ refused to pass on the substance of the [fol. 126] federal claims because "the failure to serve the statement of the case on appeal seems to us decisive • • •"

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[1] The majority in *Irvin* never questioned the validity of the adequate state ground rule for they read the state court decision as resting on the federal ground.

344 U. S. at 483. In holding that the state procedural ground was sufficient to preclude collateral review of constitutional claims, the Court said,

> The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal courts. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U. S. C. §2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal. (344 U. S. at 485.)

While the majority admit that *Daniels* established that an adequate state ground of decision will preclude relief under federal habeas corpus, they attempt to avoid the application of *Daniels* by claiming that there are "exceptional circumstances" in this case which justify the disregarding of the adequate state ground for decision. However, an examination of the facts in the *Daniels* case and in *Michel* v. *Louisiana*, 350 U. S. 91, 1955, shows that the rigor with which the Supreme Court has applied the adequate state ground rule precludes the making of an exception. In *Daniels* the petitioners who were under sentence of death did not fail to appeal at all (as in this case) but were merely one day late in serving the case on appeal. On the last day of serving the case on appeal, petitioner's attorney had called at the prosecuting attorney's office to serve him but the prosecutor was out of town; had petitioner's attorney mailed the statement on that day instead of delivering it on the next official day, the service would have been adequate.

In *Michel* v. *Louisiana*, despite the fact that the petitioner was under sentence of death in Louisiana, the Supreme [fol. 127] Court refused to pass upon his constitutional claim because of a failure to comply with state procedure. Michel, a Negro, claimed that he had been denied due process of law because there had been a systematic exclusion of Negroes from the grand jury panel which indicted him. Louisiana law required that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term but Michel's motion to

quash the indictment had not been filed until the fifth judicial day after the expiration of the term. This procedural ground was found adequate to prevent review of the constitutional claim even though Michel's counsel was not appointed until the day the grand jury's term expired and did not receive formal notice of appointment until three days later. It is also significant that in *Michel* it was clear that there had been a violation of Michel's constitutional rights. Mr. Justice Black, dissenting, pointed out that in the memory of people living in the parish there had been only one Negro selected to serve on a grand jury in that parish and he happened to look like a white man. 350 U. S. at 102.

A comparison of the facts of the *Daniels* and *Michel* cases with those in the present case shows that the adequate state ground rule does not yield to exceptional cases as the majority contends:

(1) In both *Daniels* and *Michel*, the appellants were under sentence of death, while here the appellant is subject only to imprisonment.

(2) In both *Daniels* and *Michel*, the petitioners attempted to avail themselves of state procedures and came within days of doing so; here the petitioner never sought to appeal and did not raise his claim in the state court until fourteen years after his conviction.

(3) In both *Daniels* and *Michel*, there were extenuating circumstances which could have been considered as supply-[fol. 128] ing a reason for the appellants' failure to comply with the state procedures.

(4) In *Michel*, it was, at least, as clear as it is here that there had been a denial of constitutional rights.

I do not contend that state procedural grounds for denying a hearing to federal claims must always be considered adequate to preclude federal review of that claim. Certainly, a procedural ground will not bar federal review if the state procedure discriminates against the assertion of federal claims, *Williams* v. *Georgia*, 349 U. S. 375, 1955; *Ward* v. *Love County*, 253 U. S. 17, 1920; *NAACP* v. *Alabama*, 357 U. S. 449, 1958, or unreasonably prevents the assertion of federal rights, *Davis* v. *Wechsler*, 263 U. S.

22, 1923; *Rogers* v. *Alabama*, 192 U. S. 226, 1904; *Reece* v. *Georgia*, 350 U. S. 85, 1955; *Staub* v. *City of Baxley*, 355 U. S. 313, 1958. However, inadequacy must be determined according to principles established by the Supreme Court. Since *Daniels* v. *Allen* has established that the failure to take an appeal is a reasonable ground for a state's refusal to entertain constitutional claims, we should not now hold that the failure to appeal is not a reasonable ground for denying a hearing to such claims unless the petitioner did not have an "opportunity to appeal because of lack of counsel, incapacity, or some interference by officials." *Daniels* v. *Allen*, 344 U. S. at 485. However, the petitioner here had a hearing before the district court at which he was afforded an opportunity to present facts which might have excused his failure to appeal. After weighing the proof, the district court found that "the hearing utterly failed to reveal any such circumstances."

The reliance of the majority on the "exceptional circumstances" language in *Darr* v. *Burford*, 339 U. S. 200 (1950), and *Frisbie* v. *Collins*, 342 U. S. 519 (1952), both of which were concerned with the exhaustion problem under [fol. 129] §2254, is misplaced. It is interesting to note that the majority recognizes that the exhaustion of state remedies doctrine under §2254 is distinct from the adequate state ground doctrine; yet without discussion, they find that, if there are exceptions to the exhaustion doctrine, there are like exceptions to the adequate state grounds doctrine. However, in my opinion, a proper analysis of these doctrines shows that the exception rules of the one are not applicable to the other.

The majority, in recognizing that "all the cited cases from *Ex parte Royall* to *Hawk* recognize that much cannot be foreseen, and that 'special circumstances' may justify departure from rules designed to regulate the usual case," *Darr* v. *Burford*, 339 U. S. at 210, should also have noted that the Supreme Court has always recognized that it had the power to hear these exhaustion cases without requiring resort to the state courts. Thus, the Supreme Court said in *Darr* v. *Burford*:

> "Ex parte Royall, decided in 1886, held that a federal district court *had jurisdiction to release* before trial

> a state prisoner who was held in violation of federal constitutional rights but it approved denial of the writ, as a matter of discretion. 339 U. S. at 205. (Emphasis added.)

Although the requirement of exhaustion of state remedies is a matter of discretion and "special circumstances" might require the exercise of that discretion so as to hear the federal claim on the merits even though state procedures are not exhausted, in cases in which an adequate state procedural ground for decision has been held to cut off federal review, the Supreme Court has often stated that the fact that the judgment of conviction was supported by a procedural ground for decision deprived it of the power [fol. 130] to set aside the conviction. *Whitney* v. *California*, 274 U. S. 357, 372, 1927 (Brandeis, J., concurring); *Herndon* v. *Georgia*, 295 U. S. 441, 442 (1935); *Edelman* v. *California*, 344 U. S. 357, 1953; *Irvin* v. *Dowd*, 359 U. S. 394, 412-13 (1959) (Harlan, J., dissenting); *Wolfe* v. *North Carolina*, 364 U. S. 177, 196, 1960; see *Cecenia* v. *Lagay*, 357 U. S. 504, 507 n. 2. Although all of these cases except *Irvin* v. *Dowd*, involved direct review, Mr. Justice Harlan pointed out in *Irvin* that the same rule applies in habeas corpus cases:

> It is clear that the federal courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because irrespective of their possible merit, they were not presented to it in compliance with the State's "adequate and easily-complied-with method of appeal." *Brown* v. *Allen*, 344 U. S. 443, 485 [359 U. S. at 412-13].[2]

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[2] Although this statement appears in a dissenting opinion, it appears that a majority of the Court agreed on this point. Justices Frankfurter, Clark and Whittaker concurred in Mr. Justice Harlan's dissent, and it would seem that Mr. Justice Stewart would agree with this statement for he concurred with the majority "with the understanding that the Court does not depart from the principles announced in *Brown* v. *Allen*, 344 U. S. 443" [359 U. S. at 407].

Neither *Patterson* v. *Alabama*, 294 U. S. 600 (1935), nor *Williams* v. *Georgia*, *supra*, support the proposition that on a clear showing of a constitutional deprivation, the federal courts can ignore an adequate state ground. In *Patterson*, *supra*, the Supreme Court recognized that even though the federal right was clear, the state could refuse to hear that claim because of a failure to comply with state procedures. 294 U. S. at 605. The Court decided to remand, however, because it was not certain that the state court would have considered itself powerless to consider [fol. 131] the constitutional claim if it had been aware of the merit of that claim. A reading of *Patterson* implies that the state on remand could have again rested its decision on the state procedural ground and that the Supreme Court would not then have reviewed that decision. Since in this case the state court was fully aware of the validity of the constitutional claim when it asserted that Noia's failure to appeal precluded review of his federal claim, see 3 N. Y. 2d, at 598-99, the reasoning of *Patterson* is inapplicable here.

Williams not only does not support the proposition that the federal courts can ignore an adequate state ground, but shows the reluctance of the Supreme Court to interfere with state court proceedings. In *Williams* the court found the procedural ground of the decision inadequate because the state court had discretion to hear the constitutional claim even though there was a failure to comply with the proper procedure and the state court had consistently exercised that discretion so as to hear the merits of appeals in similar cases. The inadequacy of *Williams*, therefore, arose from the fact that the state court had refused to exercise its discretion "to entertain a constitutional claim while passing upon similar issues raised in the same manner." 349 U. S. at 383; see *Wolfe* v. *North Carolina*, 364 U. S. 177, 188; Note, Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions, 61 Colum. L. Rev. 255, 266-67 (1961). Even though the Court had jurisdiction to hear the merits of the case in *Williams*, and did, in fact, find a denial of a constitutional right, out of deference to the State courts it did not reverse the conviction, but

instead remanded the case to the state court because in the argument before the Supreme Court the State Attorney General conceded that there had been a constitutional viola- [fol. 132] tion, although he had insisted before the Georgia Supreme Court that there had been no such violation. This refusal of the Court to reverse a conviction even though it had jurisdiction to do so well illustrates the deference which the Court pays to state proceedings.

The opinion of the majority could have been written in one sentence substantially, as follows: "In any criminal case in a State court wherein a confession was introduced and a conviction resulted, the defendant may, at any time thereafter without appealing such conviction or exhausting any other available state remedy, claim upon petition for a writ of habeas corpus that such confession was coerced and, upon a finding to that effect by a federal judge, a writ shall issue to the State directing the defendant's release from custody (citing cases if there be any)." If this is to be the rule of law, is not a reappraisal of our criminal procedure in this field called for! If the delicate balance of the State-Federal relationship is to be upset, possibly the majority's approach is best, namely, upset it drastically. If each case is to be decided on its own "exceptional situation" basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles. No longer will it be necessary after due deliberation to write "Failure to exhaust State remedies" or "No federal question." And in fairness to the two distinguished appellate courts in New York, would it not be better to advise them that in any case before them involving a coerced confession they are but puppets whose strings may be cut at any time by the keen edge of the "Great Writ." It may well be that there should be a definite rule that no case involving an allegedly coerced confession should be tried in a state court or, stated differently, that such a case should be tried [fol. 133] only before a federal judge. Whether this should be is for those far more learned in such matters than I to determine. I point out only that such is not the law at

the present time—at least until the filing of the majority opinion.

I would affirm.

[fol. 134]

In United States Court of Appeals

For the Second Circuit

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

United States ex rel. Charles Noia, Relator-Appellant,

v.

Edward M. Fay, Warden of Greenhaven Prison, State of New York, Respondent-Appellee.

Judgment—February 7, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded with instructions to issue the writ of habeas corpus and to order that the prisoner's conviction be set aside and that he be discharged from custody unless the appellant is accorded a new trial forthwith in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 135] [File endorsement omitted]

[fol. 136]

SUPREME COURT OF THE UNITED STATES

No. 809, October Term, 1961

EDWARD M. FAY, Warden, et al., Petitioners,

vs.

CHARLES NOIA.

ORDER ALLOWING CERTIORARI—May 14, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

No. [redacted] 84

IN THE

Supreme Court of the United States

October Term 1961

UNITED STATES OF AMERICA, *ex rel.*
CHARLES NOIA,

Respondent,

—against—

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term 1961

No.

UNITED STATES OF AMERICA, *ex rel.* CHARLES NOIA,

Respondent,

—against—

EDWIN M. FAY as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

EDWARD M. FAY, Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK, the petitioners herein, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on February 7th, 1962 which reversed the denial of an application for a writ of habeas corpus by the District Court, Southern District of New York.

Previous Proceedings

The judgment to which the petition for the writ was addressed was entered in the County Court of Kings County, New York, on March 2, 1942. It convicted appellant, Santo Caminito and Frank Bonino of the crime of Murder in the First Degree in the killing of one Murray Hammeroff during the commission of a robbery. The jury made a recommendation of clemency pursuant to Penal Law, Section 1045-a and the Court, accepting the recommendation, sentenced all defendants to a term of imprisonment for natural life.

Respondent Noia did not appeal from the judgment. This crucially important fact will be dwelt upon at length in subsequent portions of this petition.

Caminito and Bonino appealed to the Appellate Division of the Supreme Court, Second Judicial Department, which affirmed the judgment (265 App. Div. 960); and upon appeal to the New York Court of Appeals, the judgment was again affirmed (291 N. Y. 541).

At the trial, the jury were instructed with respect to all defendants that the sole evidence against them was the confession by each of his participation in the robbery. The jury were further instructed that as respects respondent, his confession admitted that it was he who had fired the fatal shot. The case was submitted to the jury with regard to Caminito and Bonino only on a felony murder theory and concerning respondent was submitted on both common law and felony murder theories. At the trial, all defendants testified that their confessions were involuntary and had been wrung from them by police brutality and illegal delay

in arraignment. The fact that the jury included respondent in their recommendation for clemency shows, of course, that he, like his co-defendants, was convicted on the felony murder theory.

In the appeals which followed, Caminito and Bonino urged upon the Appellate Division and the Court of Appeals the involuntary nature of their confessions.

Following the affirmance of the judgment by the Court of Appeals, Caminito made two motions for reargument. Both were denied (297 N. Y. 882; 307 N. Y. 686). His subsequent petition to the United States Supreme Court for certiorari was likewise denied (Black and Douglas, *JJ.* dissenting; (348 U. S. 839)). Caminito then petitioned the United States District Court for the Northern District of New York for a writ of habeas corpus, alleging therein the same ground of coerced confession which he had presented to the State Courts and to the Supreme Court of the United States. The petition was dismissed (Foley, *D.J.*, 127 F. Sup. 689). However, upon the appeal to the United States Court of Appeals for the Second Circuit, the District Court was unanimously reversed and the writ of habeas corpus was sustained (222 F. 2d 698). New York applied to the United States Supreme Court for a writ of certiorari, but the petition was denied (350 U. S. 896).

Bonino, availing himself of the happy result which had accrued to Caminito, moved in the New York Court of Appeals for reargument of its judgment of affirmance against him. The motion was granted (309 N. Y. 950); and upon reargument the Court reversed the judgment of conviction and ordered a new trial (1 N. Y. 2d 752).

The Supreme Court's denial of certiorari to New York in the *Caminito* case was followed by orders of the Kings County Court dismissing the indictment against him and vacating the judgment against Noia. The People appealed from both orders in a consolidated appeal and the Appellate Division reversed them both, thus effectuating the reinstatement of the indictment against Caminito and the judgment of conviction against Noia (4 App. Div. 2d 697, 698). The Appellate Division's order was affirmed upon appeal by Caminito and Noia to the Court of Appeals (3 N. Y. 2d 596).

In the Court of Appeals, Fuld, *J.* wrote on behalf of a unanimous Court:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him. As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has 'inherent power' to set aside its own judgment procured in violation of constitutional right.
>
> Not having participated in the appeals prosecuted by his codefendants, Noia is not entitled to the beneficial results that they obtained. Some years ago,

we held that the nonappealing codefendants of one whose conviction was reversed on appeal have 'no remedy * * * through the court'; the judgments recorded against them 'stand' and 'they must serve their sentences.' (People v. Rizzo, 246 N. Y. 334, 339). Their only recourse the court observed, was to the Governor for executive clemency.

Nor does the revitalization of coram nobis in this state since 1943 (see Matter of Lyons v. Goldstein, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed, as did his codefendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error coram nobis. (see, e.g., People v. Sullivan, 3 N. Y. 2d 196, 198). And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (see Davis v. United States, 214 F. 2d 594, 596 cert. denied 353 U. S. 960; Howell v. United States, 172 F. 2d 213, 215, cert. denied 337 U. S. 906). While the scope of coram nobis has been somewhat expanded beyond its original office (see e.g. People v. Shaw, 1 N. Y. 2d 30; People v. Kronick, 308 N. Y. 856), it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously, is not such a case."

Respondent then, on February 4, 1960 petitioned the United States District Court for the Southern District of New York for the issuance of a writ of habeas corpus and on February 5, 1960 an order to show cause why such writ should not issue directed to appellant warden, the Attorney General of the State of New York and the District Attorney of Kings County was made by Honorable Sidney Sugarman, a United States District Judge.

The District Attorney appeared in opposition on behalf of all parties to whom the order had been issued and filed an affidavit executed by Assistant District Attorney William I. Siegel on February 10, 1960. Presiding on that day was Honorable John N. Cashin, United States District Judge. As a result of the proceedings to this point, hearings were held on March 8, 1960, March 15, 1960 and March 31, 1960 before Cashin, *D.J.* Respondent appeared by counsel, Maurice Edelbaum, Esq. and petitioner appeared by William I. Siegel, Assistant District Attorney of Kings County. (The substance of these hearings appears on pages 8 *seq.* of this petition under the heading "Record Facts Material to the Questions Presented").*

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* Since these hearings, and the entire matter now sought to be reviewed through the medium of the writ of certiorari, are in no way concerned with the merits of respondent's conviction in the Kings County Court, but only with the question of his right to seek a Federal writ of habeas corpus, the evidence presented in the Kings County Court trial will not be touched upon in this petition. However, the record on appeal in the New York Supreme Court, Appellate Division, will be submitted to this Court so as to be available should the Court desire to examine it. That record was also before this Court when New York applied unsuccessfully to the Court for a writ of certiorari with respect to Caminito (denied in 350 U. S. 896).

Opinions Below

The District Court opinion is reported in 183 F. 2d 222. The opinions of the United States Court of Appeals have not as yet been officially reported.

Jurisdiction

The jurisdiction of the District Court was invoked by respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioners under Title 28, Section 2101-d, United States Code and Rule 22 of the Revised Rules of this Court effective July 1, 1954.

Applicable Statutory Provisions

(1) Title 28, Section 2254, United States Code:

> "An applicant for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(2) New York Code of Criminal Procedure, Section 517:

> "In what cases appeals may be taken by defendant. An appeal may be taken by the defendant as of right

from a judgment of conviction in a criminal action or proceeding as follows:

1. • • • ;

2. Where the judgment is other than of death in the City of New York (a) to the Appellate Division of the Supreme Court of the department in which the conviction was had, from a conviction by the Supreme Court or by the Court of General Sessions of the County of New York or a County Court, or from a conviction by a Court of Special Sessions; (b) to the Appellate Part of the Court of Special Sessions, from a conviction by a City Magistrate;

• • •."

Record Facts Material to the Question Presented

The Hearing in the District Court*

At the hearing on March 8, 1960, no testimony was taken, the hearing being devoted to argument on the question of respondent's right to the issuance of a writ. In substance, his counsel contended that Title 28, Section 2254, United States Code, in referring to the exhaustion of State remedies, meant exhaustion of State remedies available to the defendant at the time of the presentation of the petition for the Federal habeas corpus writ (S.M. p. 11 *seq.*). Petitioners answered that on the contrary the Federal statutes' basic requirement of exhaustion of State remedies meant all remedies which at any time in the past had been available to the defendant (16 *seq.*; 19 *seq.*).

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* The minutes of the hearing will be presented to the Court together with this petition. All references hereinafter made are therefore to such minutes.

On the proceedings on March 15, 1960, petitioner's counsel conceded that with respect to respondent as well as his co-defendants at the trial, the People's case consisted solely of evidence of confessions plus the *corpus delicti* and that the trial Judge had charged the jury that if they did not find the confessions to be voluntary and/or truthful, they were obligated to acquit all the defendants (27).

Testimony was taken at the March 31, 1960 hearing. Respondent, appearing in person and by counsel, testified that he was represented at the Kings County Court trial by Louis J. Wacke, Esq., now known as Louis J. Walker. Following the conviction he did not ask anyone to file a Notice of Appeal in his behalf because of lack of funds and a disinclination to impose further upon his family, who were likewise financially unable to finance an appeal. He knew nothing of any right to appeal as a poor person (38) except where sentence was of death (39). His relative, Caesar Cirigliano, a lawyer, later visited him in Sing Sing and told him that no Notice of Appeal had been filed in his behalf (42).

Respondent, however, conceded under cross-examination that Mr. Walker had visited him in the jail during the thirty-day period following the judgment of conviction during which he could have appealed. There was talk of such an appeal; but according to respondent, "he was talking about an appeal, but at the time I did not want an appeal" (43). This was due to his lack of funds (44).

Mr. Walker testified under call by petitioners. His practice from 1927 when he was admitted, to 1942 when he represented respondent, was substantially a criminal practice (46). He visited respondent in the Raymond Street jail

during the thirty day period in which a Notice of Appeal could have been filed. Caminito and Bonino had decided to appeal from the judgment (49) and Mr. Walker asked respondent if he wished that the same step be taken in his behalf, Mr. Walker being of the opinion that "an appeal would result favorably to his case" (50). Respondent negatived the suggestion. The reason given to him by Mr. Walker goes to the very nub of the present case (50).

> "A. (Continuing) My recollection is that he gave me a couple of reasons why he did not want to appeal.
>
> Q. Do you remember what those reasons were? A. One of them was that he felt that if there was a reversal and a new trial was ordered, maybe the next jury would not recommend mercy.
>
> He also told me, in substance, that his family was very financially embarassed and had no funds, but I do not think that was gone into too deeply. He did not want to appeal. That was it."

Mr. Walker testified further that he had advised respondent of his right to apply to the Appellate Division which upon showing of merit would permit the appeal to be heard on original typewritten records and would also assign counsel (55).

Respondent, according to Mr. Walker, was familiar with a contemporaneous case in which a defendant, Hull, had appealed a judgment of conviction for Murder in the First Degree with a recommendation, and upon re-trial was again convicted of that crime without a recommendation (59):

> "Q. Who proposed the Hull case to him first? A. I do not remember. I remember it was discussed. I remember every question that this man asked me as

> to his position, what would happen if a reversal came, could it happen like that case, maybe he would go to the chair on the second trial, and whatever was discussed I gave him a legal answer."

Finally, Mr. Walker testified, he offered to file a Notice of Appeal for respondent if he should decide within thirty days to do so. No request was ever made that it be done (63).

Respondent, recalled, denied having discussed the Hull case with Mr. Walker or having told the lawyer that his reason for not wanting to appeal was fear of the electric chair (63).

The District Court, in its opinion and decision dismissing the writ (183 F. S. 222), fully reviewed the history of the litigation with respect to all defendants, Caminito, Bonino and Noia from the time of the trial in the Kings County Court to the beginning of the instant petition for a writ of habeas corpus by Noia. The Court also analyzed the testimony at the hearing before it. It concluded that indigency alone does not excuse a State-Court defendant's failure to appeal from a judgment of conviction. *United States ex rel. Kozicky v. Fay*, 284 F. 2d 520. As to the requirements of Title 28, Section 2254, United States Code, for the exhaustion of State remedies as a condition precedent to the invocation of Federal jurisdiction, the District Court, held:

> "In one sense, of course, the relator has exhausted his state court remedies since there is no proceeding available to him in the State, apart, of course, from executive clemency, which can effect his release from a patently unconstitutional detention. However, exhaustion of state court remedies does not only mean

> that at the time of the petition before the Federal District Court there is no remedy available in the State. It further means that the relator has availed himself of at least one corrective process available in the courts of the state if there be such a process. (Ex parte Hawke (1944), 321 U. S. 114; Brown v. Allen (1953), 344 U. S. 443). That there was a state court process available to the relator is obvious since the codefendants have obtained their releases."

The District Court refrained from making any finding of facts concerning respondent's contentions of poverty or with respect to the proof that, on the contrary, his failure to appeal was voluntary and due to a fear of possible results. It dismissal of the writ rested solely on the basis that:

> "On the reasoning in the authorities cited above I feel constrained to dismiss the writ because of relator's failure to exhaust his state court remedies."

Question Presented

Petitioners contend that the United States Court of Appeals erred in its judgment holding that respondent was entitled under Section 2254 of the United States Code and governing law to have issued to him a writ of habeas corpus and in overruling the District Court's order which had dismissed the petition for the writ upon the ground that respondent had failed to exhaust his State Court remedies. It is petitioner's contention that respondent, by having failed to appeal to the Appellate Division of the New York Supreme Court and to the New York Court of Appeals as did his co-defendants Caminito and Bonino, had foreclosed himself from all Federal relief.

POINT I

The petition for the writ of habeas corpus was properly denied on the ground that respondent, having failed to exhaust his State remedies, was not entitled to the writ. The Court of Appeals erred in reversing the order dismissing the petition.

United States Code, Title 28, Section 2254 explicitly requires the exhaustion of State remedies as a condition precedent to an application for a Federal writ of habeas corpus. The section is but a codification of a rule firmly established by this Court long prior to its enactment. In *Ex Parte Hawke*, 321 U. S. 114, this Court in denying an application for leave to file an original petition for the writ, wrote:

> "The denial of relief to petitioner by the Federal Courts and Judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist' (citing)."

Indeed, the Revisor's note to Section 2254 points out that the Section is "declaratory of existing law as affirmed by the Supreme Court (see *Ex parte Hawke*, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. ed. 572)."

The entire current of cases decided since the enactment of Section 2254 is in strict and literal conformity with this language. Thus, in *Brown* v. *Allen*, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397, the Supreme Court was faced with a situation which, if any state of facts could justify a relaxa-

tion of the rule, constituted such justification. A defendant convicted in a State Court and sentenced to death had his appeal dismissed by the highest court of the State because the prisoner's attorneys had not served the proper statement of the case until one day after lapse of the period within which service should have been made. In upholding the denial of the writ of habeas corpus, the Supreme Court wrote:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U.S.C. Sec. 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime. * * * *
>
> Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to Section 2254. * * * The statute requires that the applicant exhaust available state remedies. *To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*" (Italics ours)

In *Michel* v. *Louisiana*, 350 U.S. 91, also a capital case, this Court refused to pass upon a constitutional claim because the defendant had failed to comply with State procedure in that he had not objected to the legality of the Grand Jury (on the ground of systematic exclusion of Negroes from the panel) during the three judicial days following the end of the Grand Jury's Term. He did do so on the fifth day. The Court refused to entertain the case even

though Mr. Justice Black in dissent asserted that historically only one Negro had ever been selected to serve on a Grand Jury in that parish.

The striking fact existing in both *Brown* v. *Allen* and *Michel* v. *Louisiana*, *supra*, is that the State Court defendants in these cases had attempted to fulfill State Court procedural requirements and had only narrowly failed to do so with complete sufficiency. In contrast, Noia had completely and voluntarily refused to take the appeal to which New York had given him an absolute right under its Code of Criminal Procedure, Section 517.

The United States Court of Appeals for the First Circuit has heretofore governed itself according to the statute. *United States ex rel. Martino* v. *Martin*, 174 F. 2d 582; *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645, cert. den. 364 U. S. 922; *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520. In *Kozicky*, *supra*, Waterman, *C.J.* (the author of the majority opinion in the case at bar) wrote for a unanimous panel:

> "If the State provided such a remedy, (i.e., an appeal) and the petitioners failed to take advantage of it, we hold they cannot obtain a writ of habeas corpus from a Federal Court. This result is a necessary consequence of 28 U.S.C.A. Section 2254."

The strictness with which the rule is applied is illustrated with particular force by *United States ex rel. Williams* v. *LaVallee*, *supra*. In *Williams*, the State defendant did in fact appeal to the Supreme Court upon a constitutional question certified by the State Court of Appeals. He did not, however, procure a certification of the question of coerced confession to be presented on the appeal, nor did he

seek certiorari in order to present this question to the Supreme Court. The Court of Appeals held:

> "In so limiting the issues assigned counsel for relator made the choice of assuring their client, as a matter of right, Supreme Court review of the one appropriate question (sentencing procedure) rather than risking discretionary certiorari review of both federal questions (sentencing procedure plus coercion). That choice resulted in a failure to exhaust state remedies because the remaining question, having been previously heard by the state courts, should have been thereafter offered for review to the Supreme Court. This was not done and hence the coercion question was not properly before the District Court. Darr v. Burford, 239 U. S. 200 (1950); Ex parte Hawke, 321 U. S. 114 (1944)."

Section 2254 was enacted for an important constitutional reason and in order to effectuate a result of paramount importance. It has been thus put in *Darr* v. *Burford*, 239 U. S. 200:

> "This favorable attitude toward procedural difficulties accords with the salutary purpose of Congress in extending in 1867 the scope of federal habeas corpus beyond an examination of the commitment papers under which a prisoner was held to the 'very truth and substance of the causes of his detention'. Through this extension of the boundaries of federal habeas corpus, persons restrained in violation of constitutional rights may regain their freedom. But since the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power, it created an area of potential conflict between state and federal courts. As it would be unseemly in our dual system

> of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sough a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

The reason has been expressed by Justice Frankfurter in *Irvin* v. *Dowd,* 359 U. S. 394, 408, with his usual felicity of phrase:

> "Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this court has general discretion to see justice done. Nor is it one of those 'technical' matters that laymen, with more confidence than understanding of our constitutional system, so often distain."

It is true that the rule has been relaxed on rare occasion and under strictly limited circumstances, *Thomas* v. *Arizona,* 356 U. S. 290; *Frisbe* v. *Collins,* 342 U. S. 519. This Court in *Brown* v. *Allen, supra,* itemized the limited instances of exception:

> "Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."

And in *United States ex rel. Williams* v. *LaVallee, supra,* the Court of Appeals for the First Circuit wrote on the subject:

> "That exception generally applies where the State determination is on non-federal grounds, e.g., a procedural bar within the state appellate process, from which certiorari jurisdiction cannot be invoked. White v. Ragan, 324 U. S. 760 (1945). It may also apply in certain situation, not applicable to the instant petition, where the State has been tardy in objecting to the federal proceedings or where the circumstances are such that prompt federal intervention is essential."

In the face of this strong *caveat* expressed in the statute, in its own decisions and in the decisions of the Supreme Court, the Court below by its majority has nevertheless held respondent to be entitled to be succored by the Federal writ from the consequences of his affirmative refusal to avail himself of State remedies. The question presents itself: Why this departure from principle and practice? The majority of the Court examined three bases upon which to consider the problem. We discuss them *seriatim.*

First, the majority held that Noia had not waived his right under the Fourteenth Amendment "not to be tried and convicted solely upon his coerced confession".

The majority then considered the question of exhaustion of State remedies and concluded:

> "We believe that if there are facts in a case so unique as to make an independent state ground of decision, elsewhere reasonable and adequate, inade-

> quate in that particular case to bar federal habeas corpus, those facts are likewise sufficient to create an exceptional case within the contemplation of section 2254 so as to permit the issuance of the federal habeas corpus writ."

The majority then turned to that phase of the case which, although denominated by it as "the independent and adequate state ground of decision", really referred to the adequacy of *presently* available state avenues of relief. Their conclusion was expressed in striking language:

> "Thus we come to the last scene in this human drama. Is there an adequate state ground in this case dooming relator to life imprisonment? Our answer is No; the state ground here is inadequate. We must realize that adequacy is a term of relativity. No state ground is entitled to unqualified deference. As we noted in the last paragraph, for the state ground to be adequate, it must be reasonable."

We have called this quote "striking language". With great deference to the majority of the Court below, it is our submission that striking as the language is, it is at the same time an expression of a human reaction completely unsupported by either legal principle or judicial precedent. As Moore, *C.J.* in his dissent recognized:

> "Thus, the majority has 'come to the last scene in this human drama' 'dooming relator to life imprisonment.' Legal principles having failed to produce the desired result, resort must be had to a tour de force by the fiat that 'No state ground is entitled to unqualified deference' and 'adequacy' in any event is but 'a term of relativity'. After all, 'for the state ground to be adequate, it must be reasonable,' and

what could be more unreasonable than requiring a defendant to appeal?

From here on the denouement comes rapidly. The 'simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate'."

It is our respectful submission that the decision of the majority of the Court below, if permitted to stand, will have three results prejudicial to the administration of the criminal justice.

First, it will practically have eliminated all of the procedural rules which New York and the other States of the Union have reasonably and within their constitutional power enacted to govern the exercise of the right of appeal in those cases where the States have granted such right. (That it is within the constitutional power of the States either to grant or to withhold the right of appeal cannot be questioned.)

Secondly, by so doing, the decision of the majority will have accomplished the harmful result,—and without good reason,—of destroying what Mr. Justice Frankfurter in *Irvin* v. *Dowd, supra,* described as "something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States."

Lastly, we do not believe that we are prophets of doom when we suggest the realistic probability that this decision will, if not reversed, let loose upon Federal District Courts a deluge of applications for writs of habeas corpus by State defendants who have in the years past failed to appeal from

judgments of conviction and who now will see in this decision the opening of a gate of relief which neither they nor others better versed in the law have heretofore considered to be possible. As Moore, *C.J.* wrote in his dissent:

> "The opinion of the majority could have been written in one sentence substantially, as follows: 'In any criminal case in a State court wherein a confession was introduced and a conviction resulted, the defendant may, at any time thereafter without appealing such conviction or exhausting any other available state remedy, claim upon petition for a writ of habeas corpus that such confession was coerced and, upon a finding to that effect by a federal judge, a writ shall issue to the State directing the defendant's release from custody (citing cases if there be any).' If this is to be the rule of law, is not a reappraisal of our criminal procedure in this field called for? If the delicate balance of the State-Federal relationship is to be upset, possibly the majority's approach is best, namely, upset it drastically. If each case is to be decided on its own 'exceptional situation' basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles. No longer will it be necessary after due deliberation to write 'Failure to exhaust State remedies' or 'No federal question.' And in fairness to the two distinguished appellate courts in New York, would it not be better to advise them that in any case before them involving a coerced confession they are but puppets whose strings may be cut at any time by the keen edge of the 'Great Writ'. It may well be that there should be a definite rule that no case involving an allegedly coerced confession should be tried in a state court or, stated differently, that such a case should be tried only

before a federal judge. Whether this should be is for those far more learned in such matters than I to determine. I point out only that such is not the law at the present time—at least until the filing of the majority opinion.

I would affirm."

We do not hope to improve upon either the rationale or the expression of Judge Moore's dissent. Nevertheless, we feel it proper to close this petition with a statement of our own belief, sincerely held, that the sovereignty of the States,—of greatest importance in our federal structure,—should not be infringed or diminished except upon compelling necessity, determined to exist within the framework of constitutional law. Certainly this result should not follow because two Federal Judges differ from seven Judges of the New York Court of Appeals in their personal reaction to the exigencies of an individual's situation. (See opinion of Fuld, *J.* for a unanimous Court, 3 N. Y. 2d 596, p. 4, *supra*). It is our respectful submission that in the case at bar the sovereignty of the State of New York has been disregarded by a decision which itself disregards the law as formulated by this Court,—law which up to the time of the instant decision has been followed by all Federal Courts.

It is therefore our prayer that the writ of certiorari be allowed in order that the State of New York may in this Court have an opportunity to right a wrong decision.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Dated: Brooklyn, New York,
March 1962.

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

No. [redacted] 84

IN THE

Supreme Court of the United States

October Term 1961

UNITED STATES OF AMERICA, *ex rel.*
CHARLES NOIA,

Respondent,

—against—

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 308—October Term, 1960.

(Argued April 20, 1961 Decided February 7, 1962.)

Docket No. 26557

UNITED STATES OF AMERICA, *ex rel.* CHARLES NOIA,

Relator-Appellant,

—v.—

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York,

Respondent-Appellee.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Appeal from order, United States District Court for the Southern District of New York, Cashin, *J.*, dismissing, after hearing, relator's application for issuance of a writ of habeas corpus. Reversed and remanded with instructions to issue the writ, unless relator is accorded a new trial forthwith.

EDWARD Q. CARR, JR., Legal Aid Society (Leon B. Polsky, appellate counsel), New York City, *for Appellant.*

EDWARD S. SILVER, District Attorney, Kings County (William I. Siegal, Asst. District Attorney, of counsel), *for Appellee.*

WATERMAN, *Circuit Judge*:

Relator, Charles Noia, and two others, Frank Bonino and Santo Caminito, were convicted twenty years ago under the laws of the State of New York for the crime of murder in the first degree upon an indictment alleging a felony murder in that they committed a homicide while engaged in an armed robbery. At trial the State offered nothing to connect any of the three with the crime except their several confessions, admitted into evidence over objections by defense counsel on the ground that the confessions were involuntarily made. Each defendant testified in his own defense and introduced evidence that each of the three confessons was obtained by police coercion in violation of the Fourteenth Amendment. The issue of the voluntariness of these confessions was submitted to the jury, the judge charging that if the confessions were found to be involuntary ones the defendants should be acquitted. The jury returned verdicts of guilty but, as it may do in New York in felony murder cases, recommended clemency. The judge accepted the jury recommendations and sentenced each of the three defendants to life imprisonment. Necessarily implied in the verdicts was a jury finding that the three confessions were not involuntary.

Bonino and Caminito appealed their convictions to the New York Supreme Court, Appellate Division, Second Department, and, on affirmance by that court, 265 App.

Div. 960, 38 N. Y. S. 2d 1012 (1942), appealed to the New York Court of Appeals, 291 N. Y. 541 (1943). Noia did not appeal. Both of the appellate tribunals considered whether the two appealing defendants had been denied due process of law by the use of their allegedly coerced confessions. The courts rejected the appellants' contentions, and affirmed the convictions. Neither Caminito nor Bonino petitioned the United States Supreme Court for certiorari at that time. Later, on two different occasions, Caminito moved the New York Court of Appeals for reargument of his appeal. These motions were denied, 297 N. Y. 882 (1948); 307 N. Y. 686 (1954).[1] After the second denial Caminito filed a petition in the U. S. Supreme Court for certiorari, which was denied, 348 U. S. 839 (1954).

Caminito forthwith petitioned the United States District Court for the Northern District of New York for the issuance of a federal writ of habeas corpus. He once more claimed that he had been denied due process of law at his New York State trial by the admission against him of his coerced confession. His petition was denied, 127 F. Supp. 689 (1955), but on appeal to our court the district court was reversed, 222 F. 2d 698 (1955). We held, as a matter of law, that Caminito's confessions had been coerced in violation of his right to due process of law under the Fourteenth Amendment and that consequently his conviction was void. A petition for certiorari to the U. S. Supreme Court was denied, 350 U. S. 896 (1955).

Thereupon Bonino, the other defendant who had appealed his conviction, petitioned the New York Court of

[1] The rules of the New York Court of Appeals impose no time limit within which a motion for reargument must be filed.

Appeals for reargument of his appeal. That court granted his application, reversed the conviction, and ordered that upon retrial his coerced confession not be introduced against him. *People* v. *Bonino*, 1 N. Y. 2d 752 (1956). In fact, neither Caminito nor Bonino has ever been retried, as indeed it would appear to be impossible to obtain their convictions without the use of these confessions; and, though they continue to be subject to indictment, they are free from restraint.

As previously stated, Noia, the relator here, did not appeal from his conviction. Hence the post-conviction procedure of applying for a belated reargument in the New York Court of Appeals, utilized first by Caminito and then by Bonino, was unavailable to him. Nevertheless, Noia was convicted at the same trial as were the other two, and convicted by the same means; therefore, if their convictions were void it seemed reasonable to incarcerated Noia that his conviction was also void. He thereupon moved to set aside his conviction and sentence by a proceeding in Kings County Court, the court wherein he was originally tried, convicted and sentenced. Noia could maintain no ground for setting aside his conviction other than the contention that his coerced confessions were inadmissible, a ground urged upon the trial court at the time of trial. He argued that since this ground had sufficed to void the convictions of his companion defendants, Caminito and Bonino, the sentencing court must have inherent power to set aside his conviction also, a conviction obtained through the same denial of due process.

The Kings County Court found that Noia's conviction was manifestly unlawful and ordered it vacated. *People* v. *Noia*, 3 Misc. 2d 447, 158 N. Y. S. 2d 683 (County Ct. 1956). The State appealed to the Appellate Division, Second Department, where the decision of the County Court was reversed 14 App. Div. 2d 698, 163 N. Y. S. 2d 796 (1957). In a memorandum opinion the Appellate Division unanimously held:

> "It was error to vacate the judgment. The respondent's contentions with respect to the illegality of his conviction involve matters which could have been adequately reviewed on appeal from the judgment of conviction. No appeal was taken. This being so, the court was without authority to grant the application (People v. Sadness, 300 N. Y. 69, 89 N. E. 2d 188; People v. Russo, 284 App. Div. 763, 135 N. Y. S. 2d 475; People v Palumbo, 282 App. Div. 1059, 126 N. Y. S. 2d 381)." 163 N. Y. S. 2d 796, 797.

Noia, in turn, appealed to the New York Court of Appeals, which unanimously affirmed the Appellate Division. *People* v. *Noia*, *reported sub nom.*, *People* v. *Caminito*, 3 N. Y. 2d 596, 170 N. Y. S. 2d 799, *cert. denied*, 357 U. S. 905 (1958). Relying upon *People* v. *Rizzo*, 246 N. Y. 334, 339, 158 N. E. 888, 890, 55 A. L. R. 711 (1927), the Court of Appeals held that Noia's failure timely to appeal from his conviction precluded him from obtaining the post-conviction relief he sought. The court went on to discuss the revitalization in New York of the extraordinary writ of *coram nobis*, see *Lyons* v. *Goldstein*, 290 N. Y. 19, 47 N. E. 2d 426, 146 A. L. R. 1422 (1943), and pointed out that, even though the scope of that common law writ had been somewhat

expanded beyond its original office by the New York courts, it was still only usable in New York for the purpose for which it was initially designed, that of presenting facts to the court of which the court was not aware at the time of the judgment sought to be vacated. 3 N. Y. at 601, 170 N. Y. S. 2d at 804. Therefore, since the ground upon which Noia sought to have his conviction set aside was apparent on the record at the time when he could have appealed, no post-conviction remedy was available to him. This was held to be so, even though the convictions of Caminito and Bonino had been vacated, the former by action of a federal court after Caminito had fully prosecuted his appeal through the New York State Courts, and the latter by a reversal upon reargument in the New York Court of Appeals itself. 3 N. Y. at 600, 170 N. Y. S. 2d at 803.[2]

After this adverse decision by the highest court of New York and the subsequent denial of his petition for a writ of certiorari in the U. S. Supreme Court, Noia petitioned the U. S. District Court for the Southern District of New York for a writ of habeas corpus in order to present to a federal court his claim that he was convicted without due process of law. Before a federal district judge could consider the merits of relator's application, Noia had to satisfy the threshold requirement set forth in 28 U. S. C. §2254 (1958), which provides that:

> §2254. State custody; remedies in State Courts
>
> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

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[2] Compare *People* v. *Boundy*, Dkt. No. 331, New York Court of Appeals 1962, with *People* v. *Codarre*, 10 N. Y. 2d 361 (1961).

State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The purport of the statute was exhaustively considered by the district judge who, in a written opinion, reported at 183 F. Supp. 222, concluded that a study of the authorities required that the statute be interpreted so as to foreclose any petitioner who had exhausted all presently available state remedies from obtaining habeas corpus relief if he had failed to pursue a previously available state remedy during the time when that remedy had been available to him. Inasmuch as Noia had not timely appealed his conviction when he could have done so, and inasmuch as the New York courts as a result of this delinquency had subsequently dismissed his latterly-brought *coram nobis* proceeding without reaching the merits of his constitutional claims, the federal district judge concluded that Noia had not exhausted his state remedies as required by the statute. In an effort to justify the failure timely to appeal his conviction relator asserted that he did not then appeal because he had no funds and he did not wish to cause his family further expense. The warden's evidence tended to indicate that Noia had not appealed for fear that upon a retrial he might receive the death penalty.

The court held relator's explanation insufficient to excuse the procedural omission and so reluctantly dismissed relator's habeas corpus petition. He found it unnecessary to make any findings with reference to the warden's suggestion. The judge recognized that it was clear that Noia, like Caminito and Bonino, could not have been convicted except for the introduction at the trial of the coerced confession, and he found that Noia was being held in a "patently unconstitutional detention," 183 F. Supp. at 225, and that prior to trial Noia had been subjected to precisely the same coercion as were his two codefendants, who, though convicted with him, were now "virtually scot free." 183 F. Supp. at 227.

Waiver

The first question before us is whether, inasmuch as his conviction was not appealed, Noia waived his undeniable constitutional right of being tried without his coerced confession in evidence. The answer to this question is to be determined according to federal law. The issue of whether there has been a waiver of a federal right is to be federally determined, even if the alleged waiver is the failure to take a particular state procedural step. See *Rice* v. *Olson*, 324 U. S. 876 (1945); *Davis* v. *O'Hara*, 266 U. S. 314 (1924); cf. *Dice* v. *Akron, C. & Y. R.R.*, 342 U. S. 359 (1952). The Supreme Court has said that waiver is ordinarily "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). The highest Court has instructed us to indulge all reasonable presumptions against the waiver of a fundamental constitutional right. *Aetna Ins. Co.* v. *Kennedy*, 301

U. S. 389, 393 (1937); *Hodges* v. *Easton*, 106 U. S. 408, 412 (1883). As was said in *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U. S. 292, 307 (1937), "We do not presume acquiescence in the loss of fundamental rights." We must apply these principles to Noia's case.

Sometimes, it is true, courts have said that a litigant has "waived" a right in circumstances where it is obvious that a known right was not intentionally abandoned within the standard announced in *Johnson* v. *Zerbst*, *supra*. In some instances, we fear, "waiver" has been misused and abused, twisted and tortured, in order either to dispose of a bothersome factual ambiguity or to reach results that would have been more accurately supportable upon other grounds. See Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1333 (1961). It can truly be said that in such cases the term "waiver" is used to describe, rather than to explain, the result reached. We do not wish to fall into this intellectual trap. If the term "waiver" does indeed identify some legal concept relevant to the case before us other than that defined in *Johnson* v. *Zerbst*, it must be contained within one of those combinations where law is applied to fact which it is more suitable to discuss below under a different conceptual label.

We turn to a consideration of whether Noia waived his constitutional right within the ambit of the term as it was defined in *Johnson* v. *Zerbst*. It would seem that a conscious and willing failure to appeal could indeed be a form of waiver. *Brown* v. *Allen*, 344 U. S. 443, 503 (1953) (opinion of Frankfurter, J.); cf. *Frank* v. *Mangum*, 237 U. S. 309,

343 (1915). If a convicted defendant is clearly apprised of a violation of his constitutional rights and of the procedure available to him for vindicating those rights, and if he is under no unfair restraint preventing this vindication, his failure to employ that procedure can be said to be an intentional relinquishment of a known right. *But see* Reitz, *supra*, at 1335.

It has been asserted that a defendant cannot waive those rights without enforcement of which the proceedings against him would be fundamentally unfair. Reitz, *supra*, at 1333. Among such non-waivable rights would be the right to be tried by an impartial tribunal, the right to be tried by a court free from mob domination—and the right not to be convicted solely upon the basis of a coerced confession. Perhaps Mr. Justice Frankfurter was referring to this concept of non-waivable rights when he said:

> Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial, *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U. S. 309, 343. When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. See *Adams* v. *United*

States ex rel. McCann, supra, at 274. Compare *Sunal* v. *Large*, 332 U. S. 174, with *Johnson* v. *Zerbst*, 304 U. S. 458, 465-469. *However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in Moore* v. *Dempsey*, 261 U. S. 86. (Emphasis added.)

Brown v. *Allen*, *supra*, at 503.

Be that as it may, adopting, as the Supreme Court has instructed us, all reasonable inferences against Noia's having waived a fundamental constitutional right, we conclude that relator did not waive his right under the Fourteenth Amendment not to be tried and convicted solely upon his coerced confession. At the time Noia made his choice not to appeal, he had just been convicted by a New York court and jury solely upon the confession which had been wrung from him. But it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment. The police at the trial only admitted to extracting his acknowledgment of guilt by methods far more subtle than brute force.[3] And even if Noia had suc-

[3] In denying the writ in the habeas corpus proceeding brought by Noia's codefendant Caminito, the district judge set forth these facts:

> Of course, there are many factors that are disturbing and cause suspicion. The holding of the defendants incommunicado, the sleeping on a hard bench without pillow or blanket in a cell probably not overheated, the failure to arraign without unnecessary delay as provided by law, the admittedly false identifications, the intensive questioning by relays of detectives—this combination together with the fact that the relator had never been arrested or convicted, would cause hesitation and suspicion on my part. So would the fact that there is little, if any, independent evidence connecting the relator with the commission of the crime. However, the same feelings must have been in the minds of the jurors and they decided the

ceeded in obtaining a reversal, he faced the possibility of a new trial in which he might be convicted again and receive the death penalty instead of life imprisonment. He had just received very shoddy treatment at the hands of the New York police—treatment that he then believed was approved by judicial authorities. Why should he expect a better brand of justice from the same authorities in the future? The posture of his case was far different immediately following the trial than it is now as a result of the intervening events which we have outlined above. We cannot believe that Noia would consciously and willingly have surrendered his constitutional right had he known then what he knows now: that there had been an undoubted violation of this right and the rectification of the wrong done him would mean his freedom, not his death. Perhaps Noia should be denied relief for some other reason, which we will discuss presently, but surely not because of any conscious or intentional waiver on his part of a right known to him to have his conviction set aside because that conviction had been obtained by depriving him of a constitutional right.

Exhaustion of State Remedies

We must now inquire whether relator's failure to appeal his conviction precludes him from relief under the Great Writ because of the requirement in 28 U. S. C. §2254, quoted

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issue in favor of the People after a complete, informative, detailed and conscientious charge.

United States ex rel. Caminito v. *Murphy*, 127 F. Supp. 689, 691-692 (1955).

The unconstitutionality of the treatment accorded the three defendants was not established until Caminito appealed the denial of the writ to our court. 222 F. 2d 698 (2 Cir. 1955).

above, that a petitioner exhaust his state remedies before seeking federal habeas corpus. In so doing it will be helpful to review the applicable legal history.

Until the year 1867 habeas corpus in the federal courts was, except for rare instances, only available to those detained in federal prisons. In that year, however, as part of its Reconstruction legislation, Congress provided that the United States courts could grant this writ in "all cases where any person may be restrained of his * * * liberty in violation of the constitution, or of any treaty or law of the United States * * *" 14 Stat. 385. With only slight changes in language this statute has come down to the present day as 28 U.S.C. §2241. This legislation gave the lower federal courts a broad jurisdiction to inquire into the constitutionality of the detention of any prisoner incarcerated pursuant to a conviction in a state court. *Ex parte Royall*, 117 U. S. 241, 247 (1886).

But in applying the statute the federal courts were hesitant to reopen matters that had been fully litigated in the state trial and state appellate courts. It was not generally accepted until well into this century that the federal habeas corpus court had the duty to make an independent review of the details of the procedure accorded the defendant in the state court in order to determine whether he had received due process of law there as required of the states by the Fourteenth Amendment. As late as 1915 the Supreme Court sanctioned a district court's refusal to inquire into the merits of an allegation of mob domination at the relator's trial because the state courts had reviewed this issue fully, first on the defendant's motion for a new trial and again on appeal to the state supreme court. *Frank*

v. *Mangum*, 237 U. S. 309 (1915). A similar approach had been taken by the Court in *In re Wood*, 140 U. S. 278, 287 (1891) (alternative holding).

Eight years after the decision in *Frank* v. *Mangum*, however, in *Moore* v. *Dempsey*, 261 U. S. 86 (1923), the Supreme Court clearly recognized the duty of a federal judge to determine for himself whether the petitioner was convicted pursuant to due process of law.[4] Again the allegation was mob domination. The Court stated:

> We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts have failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.
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> • • • We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for

[4] This abrupt change in the treatment of habeas corpus cases since the opinion in *Frank* v. *Mangum*, rendered in 1915, may have been a result of the statute enacted in 1916, limiting the appellate jurisdiction of the Supreme Court over state court decisions. 39 Stat. 726; *Reitz*, *supra*, at 1328. No longer could all defendants alleging unconstitutional infirmities in their trials in state courts bring their claims as a matter of right to the highest court.

himself when if true as alleged they make the trial absolutely void. Id. at 91, 92.

Ever since that momentous decision the Supreme Court has continued to subject the administration of state criminal justice to the independent inquiry of federal courts pursuant to a petition for habeas corpus. E.g., *Mooney* v. *Holohan*, 294 U. S. 103 (1935), *Brown* v. *Allen*, 344 U. S. 443 (1953). And, through the years, in this review of state trials, the United States courts have developed an ever expanding concept of due process. See *Darr* v. *Burford*, 339 U. S. 200, 221 (1950) (Frankfurter, J., dissenting). Reitz, *supra*, at 1329.

Meanwhile, the federal courts in habeas corpus cases were also developing another theory, this one being calculated to reduce the instances of federal habeas corpus review of state convictions. This was the requirement that a prisoner incarcerated pursuant to a state conviction exhaust his available state remedies before he seek relief under federal habeas corpus. Nineteen years after the passage of the habeas corpus statute which was to become 28 U. S. C. § 2241, the Supreme Court handed down the first opinion expounding the requirement that a habeas corpus petitioner first exhaust his state remedies. *Ex parte Royall*, 117 U. S. 241 (1886). In that case it was held that the federal court in its discretion might withhold the federal writ when the defendant sought it before his trial in the state court. See also *United States ex rel. Drury* v. *Lewis*, 200 U. S. 1 (1906). By way of dictum in the *Royall* case, the Court also recognized that, even when federal habeas corpus was sought after trial in the state court, the federal court could, in the proper exercise of its discretion,

withhold the writ so as to require the petitioner to carry his case through the state appellate system and thereafter to bring a writ of error in the U. S. Supreme Court. In accordance with this dictum the Court, that same term, denied an original petition brought after trial but before the petitioner had appealed to the state supreme court. *Ex parte Fonda*, 117 U. S. 516 (1886). The United States Supreme Court found no obstacle preventing the defendant in that case from first appealing to the highest court of the state and then, if the ultimate state decision were adverse, seeking review of that court's determination by writ of error. Other cases in which the Court placed a similar duty upon the defendant were *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13 (1925); *In re Wood*, 140 U. S. 278, 289-90 (1891) (alternative holding); *In re Frederich*, 149 U. S. 70 (1893); *New York* v. *Eno*, 155 U. S. 89 (1894); *Whitten* v. *Tomlinson*, 160 U. S. 231 (1895); *Baker* v. *Grice*, 169 U. S. 284 (1898); *Tinsley* v. *Anderson*, 171 U. S. 101 (1898); *Davis* v. *Burke*, 179 U. S. 399 (1900); *Urquhart* v. *Brown*, 205 U. S. 179 (1907); cf. *Riggins* v. *United States*, 199 U. S. 547 (1905); *Glasgow* v. *Moyer*, 225 U. S. 420 (1912).

In *Mooney* v. *Holohan*, 294 U. S. 103 (1935), the Supreme Court added a further requirement to that of fully carrying forward a state appeal, the requirement that, before seeking relief under federal habeas corpus, a petitioner exhaust the collateral remedies still open to him in the state courts, such as the state writ of habeas corpus. See also *Ex parte Hawk*, 321 U. S. 114 (1944) (*per curiam*); *Ex parte Botwinski*, 314 U. S. 586 (1942); *Ex parte Davis*,

317 U. S. 592 (1942). And the necessity of appealing from the denial of any of these state collateral remedies before bringing a petition for federal habeas corpus was announced in *Ex parte Davis*, 318 U. S. 412 (1943) (*per curiam*).[5]

The Supreme Court recognized, however, that exceptional cases might be presented in which the petitioner's duty to exhaust available state remedies would be excused and the federal court could forthwith entertain the petition for the Great Writ. Such was the famous case of *In re Neagle*, 135 U. S. 1 (1890). The petitioner there, a United States marshal, was imprisoned by the sheriff of San Joaquin County, California, on a charge of murder, because he had shot and killed one David S. Terry in the performance of the marshal's federally imposed duty to protect the life of Mr. Justice Field of the United States Supreme Court. Neagle sought release under the federal writ well in advance of trial in the state court. Counsel for the State of California asserted that an issuance of the writ of habeas corpus would deprive the state of its right to try the defendant for the crime charged. The Supreme Court (Field, *J.*, not sitting), nevertheless affirmed the United States Circuit Court for the Northern District of California, which had issued the writ of habeas corpus and had ordered the discharge of the prisoner. *In*

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[5] Apparently it was only necessary for the incarcerated delinquent to apply for one post-conviction remedy even if several were available in the state system, and he did not have to make repetitious applications for the same remedy even though this was permitted under state law. See *Brown v. Allen*, *supra*, at 448-50 & n. 3. However, he was required to seek direct review of his conviction in the United States Supreme Court. *See Darr v. Burford*, 339 U. S. 200 (1950). But see *Wade v. Mayo*, 334 U. S. 672 (1948).

re Lonely, 134 U. S. 372 (1890) was another exceptional case. There also the petitioner was discharged under the Great Writ from state detention before trial. The defendant was incarcerated awaiting trial in a state court on a charge of perjury in that he allegedly gave false testimony before a notary public regarding the contested election of a member of Congress. In upholding an issuance of the federal writ, the Supreme Court held that the state court had no jurisdiction to entertain an action so inseparably connected with the functioning of the National Government. Another case of the exceptional type was *Wildenhus's Case*, 120 U. S. 1 (1887). In that case the Court, upon a petition for federal habeas corpus prior to trial in the state court, decided the question whether the arrest of a foreign crewman by state officers was contrary to the provisions of a treaty between this country and the Kingdom of Belgium. The Court held that the arrest did not violate the treaty. It has been said that the exceptional character of these three cases, which permitted the by-passing of the state remedial processes, was that they involved either the operations of the federal government or its relations with other nations. *Whitten* v. *Tomlinson*, *supra*, at 241.

In 1944 in the well-known *per curiam* opinion of *Ex parte Hawk*, 321 U. S. 114 (1944), the Supreme Court set forth the exhaustion doctrine as it stood at the end of its pre-statutory development. The Court stated:

> Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appel-

late remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted. 321 U. S. at 116-17.

* * * * *

But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan*, *supra*, 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore* v. *Dempsey*, 261 U. S. 86; *Ex parte Davis*, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless. 321 U. S. at 118.

See, also, *White* v. *Ragen*, 324 U. S. 760, 767 (1945); *Marino* v. *Ragen*, 332 U. S. 561, 564 (1947) (Rutledge, J., concurring); *Wade* v. *Mayo*, 334 U. S. 672, 679 (1948); *Young* v. *Ragen*, 337 U. S. 235, 238 (1949); *Darr* v. *Burford*, 339 U. S. 200 (1950).

As part of the recodification of the Judicial Code in 1948 Congress added section 2254, quoted above, which gave statutory recognition to the exhaustion doctrine as it had been developed in the case law. The statutory reviser's notes acknowledged:

This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321 U. S. 114, 86 L. Ed. 572.)

H. R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947); see *Young* v. *Ragen*, *supra*, at 238 n. 1; *Darr* v. *Burford*, *supra*, at 210-211; *Irvin* v. *Dowd*, 359 U. S. 394, 405 (1959). See also S. Rep. No. 1559, 80th Cong., 2d Sess. 9 (1948); *Hear-*

ings on H. R. 3914 Before a Subcommittee of the Senate Judiciary Committee, 80th Cong., 2d Sess. 28 (1948).

In the light of the case law incorporated into the statute, does Noia's failure to appeal preclude him from federal habeas corpus relief because of the exhaustion requirement in section 2254? The language of that section appears only to require a state prisoner to exhaust those state remedies presently open to him before seeking federal habeas corpus. It does not suggest that federal habeas corpus relief has been forfeited because of a failure to utilize some state remedy available in the past but which is no longer available. The statute speaks of "remedies available in the courts of the State," "an absence of available State corrective process or the existence of circumstances rendering such process ineffective," and "if he has the right under the law of the State to raise, by any available procedure, the question presented."

The Supreme Court did not announce a concept of forfeiture in the case law development of the exhaustion doctrine. In the leading case of *Mooney* v. *Holohan*, *supra*, the Supreme Court declared:

> We do not find that petitioner has applied to the state court for a writ of *habeas corpus* upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. 294 U. S. at 115.

And in *Ex parte Hawk*, *supra*, the case heralding section 2254, it seems clear that the Court was referring to currently available remedies, not a forfeiture of the petitioner's right to federal habeas corpus for failing to resort

to previously available state remedies. In that case it was stated:

> But, as was pointed out by the District Court and Circuit Judge, petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge.
>
> • • • • •
>
> Until [coram nobis in the state courts] has been sought without avail we cannot say that petitioner's state remedies have been exhausted.
>
> • • • • •
>
> As petitioner does not appear to have exhausted his state remedies his application will be denied without prejudice to his resort to the procedure indicated as appropriate by this opinion. 321 U. S. at 116, 118.

Noted authority has maintained that in every case in which the Supreme Court upheld a dismissal of the writ because of a failure to exhaust state remedies, a state remedy was available at the time the prisoner sought federal habeas corpus. But see *Ex parte Spencer*, 228 U. S. 652, 660 (1913). It is conceded, however, that a forfeiture, to which the Supreme Court never alluded in any of its opinions, might have resulted, in some cases, through the running of the period for the alternative remedy during the pending habeas corpus proceedings. Hart, *The Supreme Court, 1958 Term: Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 113 n. 85 (1959).

Judge Parker, the Chairman of the Judicial Conference Committee that drafted the Habeas Corpus Act of which section 2254 was a part, has disclosed that the purpose of

the section was to foreclose resort to federal habeas corpus only when relief was still available in the state system. He said the following:

> One of the incidents of the state remedy is [the] right to apply to the Supreme Court for certiorari. If a petitioner has failed to make such application after the refusal of the state court to release him, he cannot be said to have exhausted the remedies available to him under state procedure, *provided he has the right to apply again to the state courts for relief as a basis for application to the Supreme Court for certiorari.*
>
> • • • • •
>
> The fact that certiorari from the Supreme Court to the state court may be called a federal remedy is not determinative of the question here involved. *The crucial matter is that petitioner still has a right to attack in the courts of the state the validity of his conviction and, upon the record made in such attack, to petition the highest court of the land for a review. So long as such right remains,* he does not have, and ought not have, the right to ask a review by one of the lower federal courts. (Emphasis added.)
>
> Parker, *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 177 (1949), quoted in *Darr* v. *Burford, supra,* at 212, n. 34.

It is plausible to interpret the doctrine of exhaustion of state remedies simply to mean that when both the state and the federal courts are available to a particular state prisoner he should go into the state court first. See Hart, *supra*, at 113. If such is the proper interpretation, section 2254 is no bar to Noia's present petition for federal habeas corpus. He has exhausted the only remedy in the state courts cur-

rently available to him, a proceeding in the nature of *coram nobis*.[6]

But we cannot assert with confidence that section 2254 only refers to present state remedies. Language in certain recent Supreme Court decisions indicates that interpreting the section to apply only to the exhaustion of presently available remedies would be erroneous. *Irvin* v. *Dowd*, 359 U. S. 394, 404-06 (1959); *Daniels* v. *Allen*, reported *sub nom. Brown* v. *Allen*, 344 U. S. 443, 486 (1953). See also *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (2 Cir. 1957). Assuming that section 2254 does indeed express a forfeiture of federal habeas corpus protection as a result of a past failure to utilize a particular state remedy, Noia would still go free, if his case is sufficiently exceptional. The statutory section attempted only to codify the existing law of exhaustion developed by the courts. As we pointed out earlier, the pre-statutory case law on exhaustion did not provide a rigid bar to habeas corpus relief; rather, it recognized exceptional situations permitting the immediate issuance of the federal writ. The language of the statute contemplates that such unusual circumstances can occur when it speaks of "circumstances rendering [state] process ineffective to protect the rights of the prisoner." We quote from the Supreme Court's opinion in *Darr* v. *Burford*, *supra*:

> *Ex parte Hawk* prescribes only what should "ordinarily" be the proper procedure; all the cited cases

[6] Although Noia could apply again for *coram nobis* relief in the New York courts, he is not required to do so before seeking federal habeas corpus. See footnote 5, *supra*, *Brown* v. *Allen*, *supra*, at 448-50 & n. 3.

> from *Ex parte Royall* to *Hawk* recognize that much cannot be foreseen, and that "special circumstances" justify departure from rules designed to regulate the usual case. The exceptions are few but they exist. Other situations may develop. Compare *Moore* v. *Dempsey*, 261 U. S. 86. Congress has now made statutory allowance for exceptions such as these, leaving federal courts free to grant habeas corpus when there exist "circumstances rendering such [state] process ineffective to protect the rights of the prisoner." 28 U. S. C. §2254. 339 U. S. at 210.

The Court in *Frisbie* v. *Collins*, 342 U. S. 519 (1952) likewise recognized the possibility of unusual circumstances allowing a by-passing of the state channels of review. Mr. Justice Black stated for a unanimous Court:

> As explained in *Darr* v. *Burford*, 339 U. S. 200, 210, this general rule is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals. 342 U. S. at 520-21.

We believe that if there are facts in a case so unique as to make an independent state ground of decision, elsewhere reasonable and adequate, inadequate in that particular case to bar federal habeas corpus, those facts are likewise sufficient to create an exceptional case within the contemplation of section 2254 so as to permit the issuance of the federal habeas corpus writ. Therefore, we have postponed a discussion of the exceptional nature of Noia's case until our consideration of the adequate nd independent state ground

concept, a concept particularly involved here, and which we now discuss.

THE INDEPENDENT AND ADEQUATE STATE GROUND OF DECISION

The presence of an independent and adequate state ground for the decision supporting Noia's detention would be sufficient basis for depriving him of his freedom quite apart from the federal Habeas Corpus Act or any other federal statute. The concept of the independent and adequate state ground originated in cases involving direct review of state court decisions by the United States Supreme Court. *Murdock* v. *Memphis*, 87 U. S. (20 Wall.) 590, 634-636 (1875).[7] In dealing with this concept upon direct review by the U. S. Supreme Court of a state decision, where the decision of the highest state court rests upon two grounds, one federal, the other non-federal, the Supreme Court has taken the position that it is pointless for it to pass on the federal issue inasmuch as the result reached by the state court can stand inviolate on the state ground regardless of the outcome reachable on the federal point.[8] It would be a clear infringement of state preroga-

[7] Mr. Justice Frankfurter, dissenting in *Irvin* v. *Dowd*, *supra*, said of the Murdock opinion:

> This decision has not unjustifiably been called one of "the twin pillars" (the other is *Martin* v. *Hunter's Lessee*, 1 Wheat. 304) on which have been built "the main lines of demarcation between the authority of the state legal systems and that of the federal system." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 503-504 (359 U. S. at 408).

[8] The formulation of the Court in *California Powder Works* v. *Davis*, 151 U. S. 389, 393 (1894) has become classic:

> It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a

tives for the U. S. Supreme Court to ignore the state ground and to command the result which would have been followed had there just been a federal question in the case. By an "independent" state ground is meant one in which no elements of federal law are present. The state ground in the present case, failure to appeal, is clearly an independent ground; therefore we shall not concern ourselves further with this requirement.[9] But the meaning of the requirement that the state ground be "adequate" is crucial to our analysis of the present case and will be discussed at greater length below. To illustrate the doctrine of an independent and adequate state ground in the sphere of direct federal review, let us suppose that the highest state court holds a contract to be void for lack of consideration and invalid because it violates the Sherman Anti-Trust Act. The Supreme Court would decline to review the federal anti-trust question because the result reached by the state courts is fully supportable on the non-federal ground of lack of consideration. Cf. *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935).

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decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented.

[9] For a case involving a non-independent state ground, see *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921).

The next step in our analysis is to recognize that the state ground that is independent and adequate need not be a substantive law ground, but can be a rule of state procedure. See, e.g., *Herndon* v. *Georgia*, 295 U. S. 441 (1935). In most cases a failure to raise or preserve federal questions in accordance with the established state procedure will result in a loss of the right to present these issues to the U. S. Supreme Court because federal review of federal issues is cut off by an independent and adequate state *procedural* ground for decision. E.g., *Edelman* v. *California*, 344 U. S. 357 (1953). For example, if a party fails to appeal from an adverse judgment within a certain time limit that judgment will become final as a matter of state procedural law. If despite failure timely to appeal the losing litigant nevertheless seeks review in the U. S. Supreme Court, that Court will probably answer him that regardless of his federal contentions, the result in the trial court must stand because of the state rule of procedure. As is true for state substantive rules, of course the state procedural rules have to meet the requirement of adequacy if they are to cut off Supreme Court determination of the federal issues.

With this background of the application of the doctrine in cases of direct review, we move to its relevance in federal habeas corpus proceedings. *Daniels* v. *Allen*, *supra*, at 482-86 instructs us that the doctrine also applies in habeas corpus cases. Mr. Justice Frankfurter, dissenting in *Irvin* v. *Dowd*, *supra*, stated the same proposition, and none of the Court disagreed.

> The problem presented by this case is as old as the Union and will persist as long as our society remains a constitutional federalism. It concerns the relation of the United States and the courts of the United States to the States and the courts of the States. The federal judiciary has no power to sit in judgment upon a determination of a state court unless it is found that it must rest on disposition of a claim under federal law. This is so whether a state adjudication comes directly under review in this Court or reaches us by way of the limited scope of habeas corpus jurisdiction originating in a District Court. 359 U. S. at 407-408.

As we see, the concept is just as important in cases of federal habeas corpus for state prisoners as it is when there is direct federal review of state court decisions. Just as it would be an encroachment on the prerogatives of the state for the Supreme Court upon direct review to disregard the state ground, equally—if not more so—would it be a trespass against the state for a lower federal court, upon a petition for habeas corpus, to disregard the state ground in granting relief to the prisoner. This is our federal system in operation. In such a system certain matters are reserved for governance by the states, other matters are to be determined according to federal law. And in such a system of government, where two sovereignties function within the same territorial boundaries, cases, such as the present one, will inevitably arise in which the law of both governments will be relevant and will have to be accommodated.

Since we have shown that an adequate state ground of decision will preclude relief under federal habeas corpus,

the question we must face is whether Noia's failure to appeal his conviction is a state procedural ground adequate to bar his path to freedom under the federal writ. This question of adequacy is one to be determined by federal law. *Staub* v. *Baxley*, 355 U. S. 313, 318-19 (1958); see *Rogers* v. *Alabama*, 192 U. S. 226 (1904). Actually, in describing the state ground, the term "adequate" embraces two dimensions of adequacy. First the state ground must be sufficiently broad-based to support the total result reached by the state court—here the relator's conviction and sentence. The state ground in the present case clearly satisfies this part of the requirement of adequacy. The second part of the requirement is that the state ground be free from certain infirmities so that it will justify a foreclosing of consideration of the federal issues involved in the case. This part of the requirement of adequacy is better understood through explanation than through definition. There are at least four ways in which the state ground can be considered inadequate, with the result that the federal court can consider the merits of the federal issue. First, if the state ground is interjected into a case and relied upon by the state court in order *to evade* the federal question, the state ground is inadequate. *Rogers* v. *Alabama*, *supra*, at 231 (1904); *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923); *Ellis* v. *Dixon*, 349 U. S. 458, 463 (1955); see *Atlantic Coast Line R.R.* v. *Mims*, 242 U. S. 532 (1917). There is no suggestion here that the state, by relying upon the defendant's failure to appeal his conviction, was doing so in order to evade its obligations under federal law. Second, if the state rule were

applied so as *to discriminate* against this particular prisoner, we could say that the state ground for decision was inadequate. *Cf.* Reitz, *supra*, at 1337 n. 86, 1341. But no discrimination has been practiced here, as any other prisoner who did not appeal would also be barred from relief. Third, if the state rule in question were found by the federal court *not to have fair and substantial support* in state law, the rule could be termed inadequate. *Staub* v. *Baxley*, 355 U. S. 313 (1958); *Ward* v. *Board of County Comm'rs*, 253 U. S. 17, 22 (1920); see *Patterson* v. *Alabama*, 294 U. S. 600, 604-05 (1935). But there appears to be sufficient support for the state rule in this case. See *People* v. *Rizzo*, 246 N. Y. 334, 158 N. E. 888 (1927); *People* v. *Sadness*, 300 N. Y. 69, 89 N. E. 2d 188, *cert. denied*, 338 U. S. 952 (1950); *People* v. *Kendricks*, 300 N. Y. 544, 89 N. E. 2d 257 (1949). Finally, even if there is no intention to evade the rights of the prisoner guaranteed to him by federal law, but the state procedural rule nevertheless *is an unreasonable bar* to the effectuation of federal rights, the Supreme Court has declared the state ground must not prevail. *Davis* v. *Wechsler*, 263 U. S. 22 (1923); *Williams* v. *Georgia*, 349 U. S. 375, 399 (1955) (dissenting opinion); see *Michel* v. *Louisiana*, 350 U. S. 91 (1955); *National Mutual Bldg. and Loan Assoc.* v. *Brahan*, 193 U. S. 635 (1904); cf. *Ellis* v. *Dixon*, 349 U. S. 458, 463 (1955). However, in the general run of cases no state rule of procedure is more reasonable or fair than that a conviction becomes final upon the defendant's failure to appeal, provided, of course, that he was under no handicap at the time of his conviction which prevented him from noting the appeal.

Thus we come to the last scene in this human drama. Is there an adequate state ground in this case dooming relator to life imprisonment? Our answer is No; the state ground here is inadequate. We must realize that adequacy is a term of relativity. No state ground is entitled to unqualified deference. As we noted in the last paragraph, for the state ground to be adequate, it must be reasonable.

Earlier in the opinion we pointed out that the Supreme Court in habeas corpus cases has consistently recognized that extraordinary circumstances might arise which would permit recourse to the federal writ even though certain state procedures were by-passed. We do not believe that the Court has expressed in those cases a closed list of exceptions. See *Frisbie* v. *Collins*, 342 U. S. 519, 520-21 (1952). We recall that the Court in *Darr* v. *Burford*, *supra*, said: "The exceptions are few but they exist. Other situations may develop." 339 U. S. at 210.

In determining whether the relevant state ground is a reasonable bar to federal rights—or whether the case is sufficiently exceptional so as to excuse an earlier omission of a state procedure—the federal court should consider the clarity and the magnitude of the substantive federal right violated. The reasonableness, and hence the adequacy, of the state procedural bar, is inversely proportionate to the importance of the federal right and the clarity of its violation. Even in the case of *Frank* v. *Mangum*, *supra*, which in certain respects announced a very limited, now obsolete, scope for federal habeas corpus, the Court asserted:

> [T]he due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form or procedure; * * * it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts whether they appear upon the record or not * * 37 U. S. at 331.

We hasten to add that we are not suggesting that a district judge should make a full review of the substantive federal issue at the outset of each habeas corpus proceeding in order to determine the adequacy of a state ground which the state asserts to be present. Such an interpretation would make the concept of an adequate state ground meaningless in practice. We do assert, however that if, as a result of a peculiar turn of events, it is obvious without detailed inquiry that a prisoner has been deprived of a significant federal right, the federal judge, in passing on the adequacy of an asserted state procedural bar, should give great weight to the clear violation of that federal right. Cf. *Darr* v. *Burford, supra,* at 202, 218. And if it should further appear without extended inquiry that the vindication of the prisoner's significant federal right would be almost certain to result in his freedom instead of the long confinement to which he was sentenced, it would be difficult indeed to conceive of any procedural miscue great enough to justify the court's refusal to look at the posture of the substantive case. Let us consider

the reason why a state procedural ground is entitled to the respect it receives. It is that the state has a right to administer its criminal justice in an orderly fashion. *Ex parte Spencer supra*, at 660. This is to assure to the state and all the defendants on a crowded criminal docket that each case will be afforded fair, full, and equal treatment. Innocent defendants must occasionally suffer along with the guilty ones in order to support this end. The moving finger of criminal justice cannot be made to stop and re-examine the contentions of every convicted defendant, once he has placed himself outside the channels of a fair state appellate review. If this were not so, the disruptions and confusion created by perpetual and irregular reconsideration of those claims would result in insufficient attention to the bona fide assertions of those who have complied with the procedural rules. It is not inconsistent with our notions of justice to let some innocent person suffer for failure to be vigilant in the protection of their rights when we cannot identify who the innocent ones are. But when the unusual case arises in which at the very outset it is obvious that on the substantive merits, as distinct from the procedural lapse, the prisoner should not be imprisoned, and those merits are of constitutional magnitude, any explanation advanced for the purpose of justifying the prisoner's continued detention is much less convincing. But, as we pointed out above fortunately the presence of an independent state ground is not always an absolute bar to the vindication of rights guaranteed by the federal Constitution. Even in our federal form of government in which the states make their own rules of procedure, we do not lose sight of the fact that the pur-

pose of all procedure is to determine and effectuate substantive rights, and not the reverse. There is no more unenlightened or cruel anachronism than an unbending reliance upon the niceties of procedure in derogation of substantive rights. Procedures exist or ought to exist for the purpose of effectuating rights, not of denying them. Cf. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 45, 51 (1939), *aff'd* 309 U. S. 390 (1940). When the substantive rights are clear, we should be most hesitant to sacrifice those rights on the altar of local practice.[10]

We consider the posture of Noia's case in the light of the principles discussed above. The right of the defendant to be tried without the introduction into evidence of a confession wrung from him against his will is a constitutional right of the greatest magnitude. In fact, since the confession constituted the sole basis for conviction, it can be said that this unconstitutional deprivation presented "a substantial claim [going] to the very foundation of a proceeding." *Brown* v. *Allen*, 344 U. S. 443, 503 (1953) (opinion of Frankfurter, *J.*). And there is no doubt but that the confession of this prisoner was in fact coerced. We quote from the opinion of the district court below:

> [T]here is no proceeding available to him in the State, apart, of course, from executive clemency, which can effect his release from a patently unconstitutional detention.
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[10] Cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (Holmes, *J.*):

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

> Even a cursory reading of the opinion of the Court of Appeals for the Second Circuit in the Caminito case (222 F. 2d 698) indicates that all of the defendants were coerced, and the Court of Appeals of the State of New York in the Bonino case has recognized this (1 N. Y. 2d 752, 152 N. Y. S. 2d 298, 135 N. E. 2d 51). 183 F. Supp at 225 & n 3.

If it were not enough that this relator's present detention obviously rests upon a violation of his constitutional right to a trial by due process of law, it is also virtually certain that Noia would remain free if he were ever released. Often the setting aside of a prisoner's conviction because of trial defects merely results in a new trial in which he is convicted again under proper procedures; but the strange turn of events in this case appears to make it unlikely that relator would again be convicted. We quote again from the district judge:

> [M]y dismissal of the writ leaves one codefendant incarcerated for the term of life imprisonment while the other two codefendants, convicted on the basis of precisely the same coercion, are virtually scot free
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> Even though Bonino and Caminito still remain under indictment it is most highly improbable that they will ever be tried again since the State presented no evidence but the presently unavailable coercion confessions in 1942. The obtaining of new evidence would appear at this late date impossible. See People v. Caminito, 4 A. D. 2d 697, 163 N. Y. S. 2d 699. 183 F. Supp. at 227 & n. 6.

The coincidence of these factors: the undisputed violation of a significant constitutional right, the knowledge of this violation brought home to the federal court at the incipiency of the habeas corpus proceeding so forcibly that the state made no effort to contradict it, and the freedom the relator's codefendants now have by virtue of their vindications of the identical constitutional right leads us to conclude that the state procedural ground, that of a simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate. The unique fact pattern in this case is such that few prisoners will find the release of Noia to have any applicability to their situations. Be that as it may, it still does not sit well on the consciences of civilized men that a man should spend the rest of his life in confinement when it is patent to all that the only reason for the detention is that he did not timely appeal his conviction.

We find no precedent that compels us to deny relator's petition. There are two leading cases in which the Supreme Court, because the petitioners failed to take certain steps in the state appellate process, has refused to consider their contentions upon habeas corpus that their convictions were unconstitutionally obtained. These cases are *Daniels* v. *Allen*, *supra*, and *Darr* v. *Burford*, *supra*. In the *Daniels* case the allegations of unconstitutional treatment embraced discrimination in the jury lists, coerced confessions, the procedure by which the state court determined the voluntariness of the confessions, and the refusal of the state court to entertain the relator's other constitutional claims. It was far from clear at the outset of the habeas corpus

proceeding in that case that there was any merit in the relator's contentions. In fact, in the case of *Brown* v. *Allen*, decided contemporaneously with *Daniels* v. *Allen*, and appealed from the same state, North Carolina, the Supreme Court held that there was no unconstitutional discrimination in the selection of jury panels. Likewise in *Darr* v. *Burford*, the merits of the relator's federal contentions had not been judicially examined or settled at the time of his habeas corpus petition, or even later. His contentions were lack of counsel and inability adequately to prepare his defense.

In a third case, *Michel et al.* v. *Louisiana*, *supra*, the petitioners alleged they had been denied due process because of the systematic exclusion of Negroes from the grand jury panels. A majority of the Supreme Court refused to consider this constitutional contention because each petitioner had failed, as required by a Louisiana statute, to file a motion in the state court challenging the composition of his particular grand jury before the third judicial day following the end of that grand jury's term. Though Mr. Justice Black, in dissent, announced that it was undisputed that only once in people's memory had a Negro ever been selected as a grand juror in the particular parish involved, this fact was not referred to in the majority opinion. *Michel* is distinguishable from our case, for in discussing the petition of one of the three defendants whose petitions were heard together, the majority of the Court stated that Louisiana had introduced at trial admissible evidence against the defendant which was likely to be unavailable to the state if a retrial were to be ordered, 350 U. S. at

99. In our case, on the other hand, the only evidence which the state put in or could have offered against Noia at the time of his trial, his coerced confession, was inadmissible.

The leading cases in which we of the Second Circuit have refused to entertain the relator's federal contentions because of a prior failure to pursue a complete journey through the state appellate system were *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645 (2 Cir. 1960) and *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (2 Cir. 1957). In the *Williams* case the relator alleged a coerced confession, but it was no more than allegation in his petition when Williams sought federal habeas corpus. In *Kozicky*, similarly, the allegation was a coerced confession, but, likewise, there was no certainty at the outset of the habeas corpus proceeding, as there is in the present case, that the relator there had truly been coerced.

On the other hand, we are led to conclude from our review of the cases in the U. S. Supreme Court in which it was obvious from the undisputed facts on appeal that an important federal right had been denied a defendant in a state court, and assertion was made that the defendant had not complied with applicable state procedure so as to avail himself of the federal right, the Supreme Court has not hesitated to afford some form of relief to the appellant.

Patterson v. *Alabama*, 294 U. S. 600 (1935), a case that reached the U. S. Supreme Court from a state supreme court on a writ of certiorari, involved facts very similar to those in the instant case. Patterson and one Clarence Norris, Negroes, were indicted and convicted of rape in an

Alabama state court. Norris asserted a denial of the equal protection of the laws as guaranteed to him by the Fourteenth Amendment on the ground that Negroes had been systematically excluded from jury service. As Caminito, in the present series of cases, Norris properly preserved his Fourteenth Amendment objection through the state proceedings; and in *Norris v. Alabama*, 294 U. S. 587 (1935), the United States Supreme Court reversed his conviction because of this deprivation of his constitutional right. Meanwhile, Patterson was trying to assert the same right. He had been tried separately from, but at the same time as, Norris, and upon the same facts. Thus, it was clear that Patterson, as Norris, had been denied his constitutional right to equal protection of the laws. But Patterson's attorney had not made a motion for a new trial or filed his bill of exceptions within the requisite time limits under Alabama law; and so the state supreme court refused to consider Patterson's contentions that his rights under the federal Constitution had been denied him. The U. S. Supreme Court dealt with whether these Alabama state procedural rules presented an adequate non-federal ground to sustain Patterson's conviction and foreclose adjudication upon Patterson's federal right. 294 U. S. at 602. Mr. Chief Justice Hughes, for a unanimous court, reversed the Alabama conviction and remanded the case to the state courts. He emphasized the exceptional situation presented by a reversal of the conviction of Patterson's associate on constitutional grounds, a reversal that made it clear that Patterson too had been denied his constitutional right. The Court concluded that upon remand the

state court might well hold that it had power to entertain Patterson's federal contentions. In the *Patterson* litigation the Supreme Court remanded for further state court consideration. Such a disposition was appropriate in that case. The remand secured the constitutional right to the petitioner with the slightest possible interference with the state's procedures.[11] Such a course is not open to us; we can only remand to the district court with instructions to issue the Great Writ. But the Supreme Court's opinion in *Patterson* teaches us one important truth crucially relevant to the case before us. In passing upon the adequacy of a state procedural ground asserted as a bar to a federal adjudication upon a clear violation of a federal right, the Supreme Court will consider whether the alleged violation of the federal right has already been fully proved and therefore undeniably demonstrated.

A similar case was *Williams* v. *Georgia*, 349 U. S. 375 (1955), also before the Supreme Court through the grant of a writ of certiorari. After conviction for murder and while under sentence of death, the petitioner, a Negro, filed an extraordinary motion in the state trial court for a new trial on the ground of unconstitutional discrimination against Negroes in the selection of a jury panel, but the state courts refused to entertain the motion because the defendant had not objected to the jury panel before trial. However, six months before Williams' motion was filed in the Georgia court, the United States Supreme Court had decided another case in which it had declared that the

[11] Patterson was retried and, apparently with the constitutional defect cured, was again convicted. *Patterson* v. *State*, 234 Ala. 342, 175 So. 371 (1937).

method of selecting jury panels in Georgia was unconstitutional upon the ground asserted by Williams. *Avery* v. *Georgia*, 345 U. S. 559 (1953). In fact, upon oral argument before the U. S. Supreme Court in *Williams*, the state conceded that Williams had been deprived of his constitutional right. Thus, the Supreme Court was again faced with the kind of problem presented in *Patterson*, on the one hand a clear violation of a constitutional right, but, on the other, a failure to follow one of the procedural rules of the relevant state. The Supreme Court concluded that it should pass upon the violation of the federal rights of the petitioner.

> We conclude that the trial court and the State Supreme Court declined to grant Williams' motion though possessed of power to do so under state law. Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us. 349 U. S. at 389.

Believing it wiser, however, to remand the case to the state courts for reconsideration of the procedural ground used there to bar petitioner, the Supreme Court followed a course similar to that which it followed in *Patterson* v. *Alabama*, *supra*. Initially in *Williams*, whether to grant the defendant's motion for a new trial was within the discretion of the Georgia trial court. And the Supreme Court decision in *Avery* was before that Georgia court when it first considered Williams' motion. But even though the state judgment was one within judicial discretion, and whether to exercise that discretion would normally have

been strictly a matter of state procedural law, nevertheless, Mr. Justice Frankfurter, for the majority of the Supreme Court, announced that federal courts could entertain the federal issues.

Finally, we mention *New York Cent. R.R. v. New York and Pa. Co.*, 271 U. S. 124 (1926). In that case the Public Service Commission of Pennsylvania held that the railroad had excessively charged the shipper and ordered the railroad to repay the amount of the excess. The Supreme Court of Pennsylvania affirmed the order and the railroad sought review by the U. S. Supreme Court. But under section 208(a) of the Transportation Act of 1920, 41 Stat. 464, it was obvious that this order was impermissible without the approval of the Interstate Commerce Commission, which had not been granted. Nevertheless, the shipper argued, and the state courts agreed, that the railroad had waived its rights under section 208(a) by not appealing a similar earlier decision of the Public Service Commission to the Pennsylvania Supreme Court. Stressing the clarity of the substantive point, Mr. Justice Holmes for a unanimous Court reversed the judgment of the state court, thus vindicating the federal right despite the state procedural point.[12]

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[12] The earlier complaint did not result in a final order, and, therefore, could never have reached the U. S. Supreme Court for review. However, that litigation, although not involving a final order, was appealable to the state supreme court. It was the railroad's failure to appeal to the state court which presented the potential adequate state ground. The finality of the first proceeding before the state commission and their chances of reaching the U. S. Supreme Court could not have resolved the question whether the railroad's failure to appeal in the state system was an adequate ground of decision so as to cut off federal review of the federal issues.

Conclusion

The importance of this litigation has led us to consider more than the single issue presented to us on appeal—that of the proper interpretation of the language of 28 U. S. C. §2254. This extraordinary case required an examination of the law involving not only the so-called "exhaustion of remedies" concept but also the other concepts present in this important and difficult area.

In the light of the authorities and the precedents, we find our duty clear.

The order of dismissal is reversed and the case remanded to the district court with instructions to issue the writ and to order that the prisoner's conviction be set aside and that he be discharged from custody unless forthwith accorded a new trial.

We are indebted to the Legal Aid Society and to its appellate counsel for a most able presentation in relator's behalf.

Moore, *Circuit Judge* (dissenting):

The function of the federal courts in a habeas corpus proceeding brought to test a state court conviction challenged as invalid under the Fourteenth Amendment for want of due process is not to substitute their own conceptions of substantive and procedural justice for that of the state but rather to determine whether the state has denied the relator due process of law. Thus, attention must be concentrated upon those processes made available to rela-

tor by the state to assure him of adequate opportunities and facilities to claim and to have adjudicated his constitutional rights. The lengthy opinion of the majority, while paying occasional lip service to certain fundamental and well-established jurisdictional principles relating to federal review of state convictions, actually repudiates in radical fashion the very principles developed over the years by the Supreme Court. The doctrine now enunciated by the majority is that whenever a group of appellate judges wish to depart from previously settled principles, they may find that "extraordinary circumstances" exist and that such a finding entitles them to ignore on an *ad hoc* basis all otherwise applicable principles. Realizing that such a declaration has alarmist implications, it will be necessary to analyze the facts, the law and the majority opinion rather critically lest the cry of "wolf-wolf" rouse in vain those watchful of the administration of criminal justice.

On May 11, 1941, Noia, Bonino and Caminito were apprehended and thereafter charged with first-degree murder. Upon a jury trial, they were convicted. Clemency was recommended by the jury so that sentences of life imprisonment instead of death were imposed. Bonino and Caminito appealed through the state courts and sought certiorari from the Supreme Court which was denied. Noia, the relator here, having been advised by counsel of his right to appeal, chose not to do so. On the habeas corpus proceeding, there was testimony given by Noia's trial counsel that Noia did not wish to risk an appeal which, if successful, might result in a re-trial upon which, if convicted,

the death penalty might be imposed. Noia testified that he had no funds to retain an attorney to prosecute an appeal and did not wish to put his family further into debt. The trial court made no findings on these factual issues.

As a result of the court proceedings set forth in the majority opinion, Bonino and Caminito find themselves relieved of their judgments of conviction because of decisions that coerced confessions were used against them. Quite naturally, Noia regrets his original decision not to appeal and, despite this failure, wishes to enjoy the same benefits as his former co-defendants. And so he now argues that, although he has knowingly and voluntarily failed to appeal and no longer has the right to appeal, he may still substitute federal habeas corpus for the state provided appellate procedure which he chose not to pursue.

Were such an argument to be accepted as sound, any defendant convicted in a State court after a trial, in which an allegedly coerced confession has been used and in which the question of coercion has been fairly submitted for jury determination, can in the event of an adverse decision obtain a new trial of the identical issue before a federal judge merely by allowing the time to appeal to elapse and then applying under Section 2254 for a federal writ. To the majority, such failure is without legal significance because it should "not sit well on the consciences of civilized men that a man should spend the rest of his life in confinement when it is patent to all that the only reason for the detention is that he did not timely appeal his conviction" (Maj. Op., p. 3135).

In order to accomplish the result they desire, the majority have to find that Noia's right to habeas corpus was not barred by any one of three well-established rules of federal review: (1) that a party cannot seek to have a conviction set aside on the ground that his constitutional rights were violated if he has intentionally waived his right to assert that claim; (2) that federal habeas corpus is not available to state prisoners who have not exhausted their state remedies, 28 U. S. C. §2254; and (3) that state convictions are not subject to federal review if there is an adequate state ground which will sustain the conviction.

Thus, "The first question before us is whether inasmuch as his conviction was not appealed, Noia waived his undeniable constitutional right of being tried without his coerced confession in evidence" (Maj. Op., pp. 3109-10). In answering this question, the majority starts out by purporting to adhere to legal principles and by conceding that "waiver is ordinarily 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)." Next they recognize that, "It would seem that a conscious and willing failure to appeal could indeed be a form of waiver. *Brown* v. *Allen*, 344 U. S. 443, 503 (1953) (opinion of Frankfurter, J.)." Undisputedly Noia knew that a "coerced" confession had been used against him on his trial. His failure to appeal was "conscious and willing" enough. What better exercise of judgment than to exercise it in favor of saving his life. The majority "cannot believe that Noia would consciously and willingly have surrendered his constitutional right had he known then what he knows now:".

Nor can I. What defendant would ever plead guilty or waive for good cause his right to appeal if he knew in advance that he would be acquitted or that his conviction would be reversed and the indictment dismissed. Nevertheless, the decision of the majority is that "relator did not waive his right under the Fourteenth Amendment not to be tried and convicted solely upon his coerced confession.", and that despite the adequacy of State appellate procedure, Noia was not required to use it because "it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment", (Maj. Op., p. 3112).

Since the question of whether Noia intentionally waived his right to claim that a coerced confession was used against him involved an issue of fact, it is not proper for the majority to substitute its speculation and its conclusions as to why Noia failed to appeal for the evidence actually presented to the district court and to formulate a judgment were based on facts now known rather than on the facts existing at the time of the conviction. As previously mentioned, in the hearing before the district court Noia's trial counsel testified for the state that Noia did not appeal because he feared that on retrial the death penalty might be imposed. If we accept this as true, it is clear that Noia intentionally waived his right to claim that a coerced confession was used against him. Although this testimony was contradicted by Noia's testimony, the district court did not make any finding on this question because it believed that its decision on the 2254 issue made such a finding unnecessary. 183 F. Supp. at p. 225 n. 4.

Thus, even if the majority were correct in holding that Noia's right to federal review was not barred because of a failure to exhaust state remedies or by an adequate state ground, this court should not order the district court to issue the writ because there is still a question of fact on the issue of waiver that must be decided by the district court.

The majority next turns to the question, "whether Noia's failure to appeal his conviction precludes him from relief under the Great Writ because of the requirement in 28 U. S. C. §2254 * * * that a petitioner exhaust his state remedies before seeking federal habeas corpus." While recognizing that "language in certain recent Supreme Court decisions indicates that interpreting the section to apply only to the exhaustion of presently available remedies would be erroneous" (Maj. Op., p. 3123), the majority finds it plausible to interpret §2254 "simply to mean that when both state and federal courts are available to a particular state prisoner he should go into the state court first."

Since I believe that Noia is not entitled to federal habeas corpus because his conviction is supported by an adequate state ground which precludes federal review (to be discussed *infra*) and also because he probably waived his constitutional claim, there would be little to be gained from my setting forth extensively my views on whether §2254 applies to past as well as present state remedies although, in my opinion, a more reasonable reading of the statute would be one which would not permit a defendant to fail wilfully to avail himself of the due process which the state accords him and then claim exhaustion of remedy. How-

ever, since the majority have chosen to deal with this question at length, they should have given some consideration to the question, which will no doubt plague the district courts, namely, how does this decision affect our prior ruling in *United States ex rel. Kozicky* v. *Fay*, 2 Cir., 1957, 248 F. 2d 520. In *Kozicky*, a case in which the defendant had failed to appeal to the New York Court of Appeals from a state court conviction, the author of the majority opinion in this case said (for a unanimous panel), "If the state provided such a remedy (i.e., an appeal) and the petitioners failed to take advantage of it, we hold they cannot obtain a writ of habeas corpus from a federal court. This result is a necessary consequence of 28 U. S. C. A. §2254." 248 F. 2d at 522. He continued, "But, where the failure of a prisoner to obtain relief is due to his own inaction, 28 U. S. C. A. §2254 prohibits intervention by the federal courts." 248 F. 2d at 523. Does the majority wish to overrule *Kozicky* completely or would they hold that the decision was right but the reasoning was wrong? What of the statement in *Kozicky* that "it would be unseemly in our dual system of government for a federal district court to upset a state conviction without an opportunity to the state courts (sic) to correct a constitutional violation" (248 F. 2d at 523, quoting from *United States ex rel. Marcial* v. *Fay*, 2d Cir., 1957, 247 F. 2d 662)?

Lastly after conceding that "an adequate state ground of decision will preclude relief under federal habeas corpus," the majority pose the question: "Whether Noia's failure to appeal his conviction is a state procedural ground adequate to bar his path to freedom under the federal writ"

(Maj. Op., p. 3128). Thus, the majority has "come to the last scene in this human drama" "dooming relator to life imprisonment." Legal principles having failed to produce the desired result, resort must be had to a *tour de force* by the fiat that "No state ground is entitled to unqualified deference" and "adequacy" in any event is but "a term of relativity." After all, "for the state ground to be adequate, it must be reasonable," and what could be more unreasonable than requiring a defendant to appeal?

From here on the denouement comes rapidly. The "simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate."

However, the adequate state ground doctrine, namely, that a federal court cannot consider the merits of a constitutional claim alleged to invalidate a state conviction if that claim was not presented to the state courts by the use of all reasonable state procedures, cannot be disregarded as easily as the majority assumes. As Mr. Justice Frankfurter said in reference to this doctrine:

> Something that goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut on the assumption that this Court has general discretion to see justice done. Nor is it one of those technical matters that laymen, with more confidence than understanding of our constitutional system so often disdain. [*Irvin* v. *Dowd*, 359 U. S. 394, 408, 1959 (dissenting opinion).] [1]

[1] The majority in *Irvin* never questioned the validity of the adequate state ground rule for they read the state court decision as resting on the federal ground.

The decision of the Supreme Court in *Daniels* v. *Allen*, *decided sub nom. Brown* v. *Allen*, 344 U. S. 443, 1953, clearly controls the issues in this case and requires affirmance of the dismissal of the writ. The petitioners in *Daniels* had made timely objection to the introduction in evidence against them of confessions which were alleged to have been coerced and had also made timely motions at their trial to quash the indictment and challenge the array, alleging discrimination against Negroes in the selection of the grand and petit jurors. On appeal, the Supreme Court of North Carolina refused to examine these constitutional claims because the statement of the case on appeal had been filed one day after the period of limitation for such service. After the Supreme Court had denied certiorari and the state court twice denied leave to apply for *coram nobis*, the petitions for habeas corpus were filed alleging the use of a coerced confession and discrimination in the selection of the grand and petit jurors. The Supreme Court in affirming the denial of the writ refused to pass on the substance of the federal claims because "the failure to serve the statement of the case on appeal seems to us decisive * * * " 344 U. S. at 483. In holding that the state procedural ground was sufficient to preclude collateral review of constitutional claims, the Court said,

> The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal courts. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U. S. C. §2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal. (344 U. S. at 485.)

While the majority admit that *Daniels* established that an adequate state ground of decision will preclude relief under federal habeas corpus, they attempt to avoid the application of *Daniels* by claiming that there are "exceptional circumstances" in this case which justify the disregarding of the adequate state ground for decision. However, an examination of the facts in the *Daniels* case and in *Michel* v. *Louisiana*, 350 U. S. 91, 1955, shows that the rigor with which the Supreme Court has applied the adequate state ground rule precludes the making of an exception. In *Daniels* the petitioners who were under sentence of death did not fail to appeal at all (as in this case) but were merely one day late in serving the case on appeal. On the last day for serving the case on appeal, petitioner's attorney had called at the prosecuting attorney's office to serve him but the prosecutor was out of town; had petitioner's attorney mailed the statement on that day instead of delivering it on the next official day, the service would have been adequate.

In *Michel* v. *Louisiana*, despite the fact that the petitioner was under sentence of death in Louisiana, the Supreme Court refused to pass upon his constitutional claim because of a failure to comply with state procedure. Michel, a Negro, claimed that he had been denied due process of law because there had been a systematic exclusion of Negroes from the grand jury panel which indicted him. Louisiana law required that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term but Michel's motion to quash the indictment had not been filed until the fifth judicial day after

the expiration of the term. This procedural ground was found adequate to prevent review of the constitutional claim even though Michel's counsel was not appointed until the day the grand jury's term expired and did not receive formal notice of appointment until three days later. It is also significant that in *Michel* it was clear that there had been a violation of Michel's constitutional rights. Mr. Justice Black, dissenting, pointed out that in the memory of people living in the parish there had been only one Negro selected to serve on a grand jury in that parish and he happened to look like a white man. 350 U. S. at 102.

A comparison of the facts of the *Daniels* and *Michel* cases with those in the present case shows that the adequate state ground rule does not yield to exceptional cases as the majority contends:

(1) In both *Daniels* and *Michel*, the appellants were under sentence of death, while here the appellant is subject only to imprisonment.

(2) In both *Daniels* and *Michel*, the petitioners attempted to avail themselves of state procedures and came within days of doing so; here the petitioner never sought to appeal and did not raise his claim in the state court until fourteen years after his conviction.

(3) In both *Daniels* and *Michel* there were extenuating circumstances which could have been considered as supplying a reason for the appellants' failure to comply with the state procedures.

(4) In *Michel*, it was, at least, as clear as it is here that there had been a denial of constitutional rights.

I do not contend that state procedural grounds for denying a hearing to federal claims must always be considered adequate to preclude federal review of that claim. Certainly, a procedural ground will not bar federal review if the state procedure discriminates against the assertion of federal claims, *Williams* v. *Georgia*, 349 U. S. 375, 1955; *Ward* v. *Love County*, 253 U. S. 17, 1920; *NAACP* v. *Alabama*, 357 U. S. 449, 1958, or unreasonably prevents the assertion of federal rights; *Davis* v. *Wechsler*, 263 U. S. 22, 1923; *Rogers* v. *Alabama*, 192 U. S. 226, 1904; *Reece* v. *Georgia*, 350 U. S. 85, 1955; *Staub* v. *City of Baxley*, 355 U. S. 313, 1958. However, inadequacy must be determined according to principles established by the Supreme Court. Since *Daniels* v. *Allen* has established that the failure to take an appeal is a reasonable ground for a state's refusal to entertain constitutional claims, we should not now hold that the failure to appeal is not a reasonable ground for denying a hearing to such claims unless the petitioner did not have an "opportunity to appeal because of lack of counsel, incapacity, or some interference by officials." *Daniels* v. *Allen*, 344 U. S. at 485. However, the petitioner here had a hearing before the district court at which he was afforded an opportunity to present facts which might have excused his failure to appeal. After weighing the proof, the district court found that "the hearing utterly failed to reveal any such circumstances."

The reliance of the majority on the "exceptional circumstances" language in *Darr* v. *Burford*, 339 U. S. 200

(1950), and *Frisbie v. Collins*, 342 U. S. 519 (1952), both of which were concerned with the exhaustion problem under 2254, is misplaced. It is interesting to note that *the majority recognizes that the exhaustion of state remedies* doctrine under 2254 is distinct from the adequate state ground doctrine; yet without discussion, they find that, if there are exceptions to the exhaustion doctrine, there are like exceptions to the adequate state grounds doctrine. However, in my opinion, a proper analysis of these doctrines shows that the exception rules of the one are not applicable to the other.

The majority, in recognizing that "all the cited cases from *Ex parte Royall* to *Hawk* recognize that much cannot be foreseen, and that 'special circumstances' may justify departure from rules designed to regulate the usual case," *Darr v. Burford*, 339 U. S. at 210, should also have noted that the Supreme Court has always recognized that it had the power to hear these exhaustion cases without requiring resort to the state courts. Thus, the Supreme Court said in *Darr v. Burford*:

> Ex parte Royall, decided in 1886, held that a federal district court *had jurisdiction to release* before trial a state prisoner who was held in violation of federal constitutional rights but it approved denial of the writ as a matter of discretion. 339 U. S. at 205. (Emphasis added.)

Although the requirement of exhaustion of state remedies is a matter of discretion and "special circumstances" might require the exercise of that discretion so as to hear the federal claim on the merits even though state procedures

are not exhausted, in cases in which an adequate state procedural ground for decision has been held to cut off federal review, the Supreme Court has often stated that the fact that the judgment of conviction was supported by a procedural ground for decision deprived it of the power to set aside the conviction. *Whitney* v. *California*, 274 U. S. 357, 372, 1927 (Brandeis, J., concurring); *Herndon* v. *Georgia*, 295 U. S. 441, 442 (1935); *Edelman* v. *California*, 344 U. S. 357, 1953; *Irvin* v. *Dowd*, 359 U. S. 394, 412-13 (1959) (Harlan, J., dissenting); *Wolfe* v. *North Carolina*, 364 U. S. 177, 196, 1960; see *Cecenia* v. *Lagay*, 357 U. S. 504, 507 n. 2. Although all of these cases except *Irvin* v. *Dowd*, involved direct review, Mr. Justice Harlan pointed out in *Irvin* that the same rule applies in habeas corpus cases:

> It is clear that the Federal courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because irrespective of their possible merit, they were not presented to it in compliance with the State's "adequate and easily-complied-with method of appeal." *Brown* v. *Allen*, 344 U. S. 443, 485 [359 U. S. at 412-13].[2]

Neither *Patterson* v. *Alabama*, 294 U. S. 600 (1935), nor *Williams* v. *Georgia*, *supra*, support the proposition that

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[2] Although this statement appears in a dissenting opinion, it appears that a majority of the Court agreed on this point. Justices Frankfurter, Clark and Whittaker concurred in Mr. Justice Harlan's dissent, and it would seem that Mr. Justice Stewart would agree with this statement for he concurred with the majority "with the understanding that the Court does not depart from the principles announced in *Brown* v. *Allen*, 344 U. S. 443" [359 U. S. at 407].

on a clear showing of a constitutional deprivation, the federal courts can ignore an adequate state ground. In *Patterson, supra*, the Supreme Court recognizes that even though the federal right was clear, the state could refuse to hear that claim because of a failure to comply with state procedures. 294 U. S. at 605. The Court decided to remand, however, because it was not certain that the state court would have considered itself powerless to consider the constitutional claim if it had been aware of the merit of that claim. A reading of *Patterson* implies that the state on remand could have again rested its decision on the state procedural ground and that the Supreme Court would not then have reviewed that decision. Since in this case the state court was fully aware of the validity of the constitutional claim when it asserted that Noia's failure to appeal precluded review of his federal claim, see 3 N. Y. 2d, at 598-99, the reasoning of *Patterson* is inapplicable here.

Williams not only does not support the proposition that the federal courts can ignore an adequate state ground, but shows the reluctance of the Supreme Court to interfere with state court proceedings. In *Williams* the court found the procedural ground of the decision inadequate because the state court had discretion to hear the constitutional claim even though there was a failure to comply with the proper procedure and the state court had consistently exercised that discretion so as to hear the merits of appeals in similar cases. The inadequacy of *Williams*, therefore, arose from the fact that the state court had refused to exercise its discretion "to entertain a constitutional claim while passing upon similar issues raised in the same man-

ner." 349 U. S. at 383; see *Wolfe* v. *North Carolina*, 364 U. S. 177, 188; Note, Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions, 61 Colum. L. Rev. 255, 266-67 (1961). Even though the Court had jurisdiction to hear the merits of the case in *Williams*, and did, in fact, find a denial of a constitutional right, out of deference to the State courts it did not reverse the conviction, but instead remanded the case to the state court because in the argument before the Supreme Court the State Attorney General conceded that there had been a constitutional violation, although he had insisted before the Georgia Supreme Court that there had been no such violation. This refusal of the Court to reverse a conviction even though it had jurisdiction to do so well illustrates the deference which the Court pays to state proceedings.

The opinion of the majority could have been written in one sentence substantially, as follows: "In any criminal case in a State court wherein a confession was introduced and a conviction resulted, the defendant may, at any time thereafter without appealing such conviction or exhausting any other available state remedy, claim upon petition for a writ of habeas corpus that such confession was coerced and, upon a finding to that effect by a federal judge, a writ shall issue to the State directing the defendant's release from custody (citing cases if there be any)." If this is to be the rule of law, is not a reappraisal of our criminal procedure in this field called for? If the delicate balance of the State-Federal relationship is to be upset, possibly the majority's approach is best, namely; upset it drastically. If each case is to be decided on its own "ex-

ceptional situation" basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles. No longer will it be necessary, after due deliberation to write "Failure to exhaust State remedies" or "No federal question." And in fairness to the two distinguished appellate courts in New York, would it not be better to advise them that in any case before them involving a coerced confession they are but puppets whose strings may be cut at any time by the keen edge of the "Great Writ." It may well be that there should be a definite rule that no case involving an allegedly coerced confession should be tried in a state court or, stated differently, that such a case should be tried only before a federal judge. Whether this should be is for those far more learned in such matters than I to determine. I point out only that such is not the law at the present time—at least until the filing of the majority opinion.

I would affirm.

IN THE

Supreme Court of the United States

October Term, 1961

No. 897

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

against

CHARLES NOIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT CHARLES NOIA IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1961

No. 809

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,
Petitioners,

against

CHARLES NOIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT CHARLES NOIA IN OPPOSITION

Opinions Below

The decision of the United States District Court for the Southern District of New York dismissing the writ of habeas corpus is reported at 183 F. Supp. 222. The opinion of the Court of Appeals for the Second Circuit, reversing the District Court, is not yet officially reported and is set forth as an Appendix to the Petition herein.

On March 2, 1962, the Court below denied without opinion a request for reconsideration *in banc;* Chief Judge Lumbard, Judges Moore and Hays voting for reconsideration and Judges Clark, Waterman, Friendly, Smith, Kaufman and Marshall against.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U. S. C. § 2101(d). This Court appears to have jurisdiction over the petition of Warden Fay under 28 U. S. C. § 1254(1). The "People of the State of New York" were not a party to the proceeding below.

Question Presented

Whether this Court should review the factual determinations by the Court below that (1) relator has not waived his claim of unconstitutional conviction by means of an involuntary confession; (2) special circumstances excused relator's failure to exhaust formerly available remedies; and (3) the decision of the New York Courts denying relator relief was based upon an inadequate state ground.

Statement

Charles Noia, Santo Caminito and Frank Bonino were jointly indicted, tried and convicted of felony murder in Kings County (N. Y.) Court and sentenced on March 2, 1942 to life imprisonment.

The sole evidence of guilt against each of the defendants was a pre-trial confession. All three defendants unsuccessfully contended at their trial that their confession had been coerced by third degree methods. The facts concerning Noia's confession, which are uncontested by the petitioner, are as follows:

Noia was seized and held in custody by the New York City police at the 62nd Precinct in New York from 5:00 p.m. on May 11, 1941 until the morning of May 13th, when he

was arraigned. He was not booked or arrested until after 2:30 a.m. on May 13th when he had confessed (F. 1131);[1]

His wife was in the custody of the police on May 11th and this fact was known to Noia (F. 281, 966-968);

During this period, he was questioned continuously by at least seven detectives (F. 213, 232, 393, 394, 404, 499, 500, 502-507, 513-522, 579-583, 585, 974-976, 1039, 1041, 1061, 1117-1120, 1121, 1132, 1135-1137, 1161, 1202, 1206);

Noia was briefly taken from the station house to his house, where without a warrant, the police broke into his home (F. 564);

The families of all the defendants were in the station house and were refused access to the prisoners (F. 350);

An attorney representing Noia and Caminito tried for two days to see the prisoners but was refused (F. 1070, 1298-1311).

In the early morning of May 12th Noia was placed in an unheated cell, without blankets, etc., described by one police officer:

> "Q. You say there was a bench in the cell; is that correct? A. That is right.
> Q. A wooden bench? A. It is sort of a car fender that lays down off the wall." (F. 577)

During the afternoon of May 12th, two women and a man were brought in to face Noia, Caminito and Bonino.

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[1] Page references preceded by the letter "R" refer to the record of the proceedings in the District Court; references preceded by "F" denote folios in the Record on Appeal in *People* v. *Bonino* and *Caminito* which was offered in evidence by both parties at the District Court hearing but not received. The Court of Appeals was asked to take judicial notice of this Record which had previously been before it in the *Caminito* case, and the Clerk of the Court of Appeals has certified to this Court the copy of the Record handed up to the court below upon argument of the appeal.

The defendants were not told that the witnesses were detectives. Each witness falsely pretended to identify the defendants as the persons who were involved in the holdup and murder.[2]

The day following arraignment Noia was examined by a Department of Correction physician who testified without contradiction:

> "Q. What treatment if any did you give the defendant Noia? A. When I examined him he had a large bruise on his right thigh. He had some contusions of the scalp, and he had some contusions of the lower posterior chest wall, on the left chest wall." (F. 1242)

Testimony by the doctor as to Noia's complaints of pain and police brutality was excluded (F. 1244-5).

Testimony of the co-defendants, while not of the same unimpeachable character as above, is particularly relevant because, while they too claimed coercion of their confessions, they testified that Noia had been far more severely dealt with by the police than either of them. Bonino testified that when he saw Noia prior to the confession:

> "Noia told me that they are going to lock up his wife and baby * * * He lifted up his pants and showed me a bruise. He pulled open his shirt and showed me a bruise on his stomach * * * He said, 'The detectives hit me'." (F. 1442)
>
> "I seen Noia. He was crying."

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[2] At the trial, in his opening statement to the jury, the District Attorney said: "The following morning the detectives decided something had to be done if they were going to get anywhere with this case. They thereafter sent to New York for two female detectives from the Pick-pocket Squad and another detective named Gavin, who they thought looked nothing like a detective, and these defendants were placed in a room and one by one these witnesses, alleged witnesses, were brought in, and they ostensibly identified these defendants as perpetrators of the crime, although they were not actually witness to the crime." See 222 F. 2d 698, 700 n. 1a.

Caminito testified as to events which occurred late on May 11th,

> "Charles Noia came in. I saw he was limping. I said 'what happened?'
>
> • • •
>
> He said 'I just got kicked around a little bit'." (F. 1274-1275)

The next day when he saw Noia,

> "I went over to him. I said 'what happened?'
>
> • • •
>
> He said, 'they threatened to lock up my wife • • • I have been beat so bad I cannot move.' I said 'I was hit too, but take it easy.'
>
> • • •
>
> He picked up his leg and showed me a bruise on his leg, and his side was hurting • • • I said, 'Don't worry they won't arrest your wife I saw her last night.' He said 'Where?' I said, 'Home.' The detective took her home. He said 'Maybe they arrested her.' I said, 'Don't worry • • • Stop crying, don't worry, we didn't do it • • •." (F. 1780-2)

Bonino and Caminito appealed their convictions to the Appellate Division of the Supreme Court of the State of New York, which affirmed the convictions without opinion (265 App. Div. 960); and then appealed to the New York Court of Appeals, which similarly affirmed (291 N. Y. 541). Eleven years later, Caminito made his second timely application to the New York Court of Appeals for reargument which was denied (307 N. Y. 686). Application to this Court for a writ of certiorari was denied, two justices dissenting (348 U. S. 839). Caminito then petitioned the United States District Court for the Northern District of New York for a writ of *habeas corpus*. The writ was dismissed (127 F. Supp. 689). Upon appeal, the United States Court of Appeals for the Second Circuit reversed. The opinion for the Court of Appeals by the late

Jerome Frank sets forth the "loathsome" and "satanic practices" inflicted by the State of New York upon Noia, Caminito and Bonino to obtain the confessions which it used to convict them. A petition to this Court to review the decision of the Court of Appeals was denied (350 U. S. 896).

Bonino then moved to the New York Court of Appeals for reargument of the affirmance of his conviction. The application was granted and his conviction vacated with directions that he be retried without resort to his confession (1 N. Y. 2d 752).

Noia, who had not appealed from the judgment of conviction, moved the trial court for relief in the nature of writ of error *coram nobis*. His conviction was vacated by the court in which he had been convicted upon a finding that his conviction was "manifestly unlawful" and that fundamental justice demanded a new trial (3 Misc. 2d 447, 158 N. Y. S. 2d 683). The Appellate Division of the Supreme Court reversed (4 A. D. 2d 697), holding *coram nobis* unavailable, and the reversal was affirmed by the New York Court of Appeals reported *sub nom People v. Caminito*, 3 N. Y. 2d 596. This Court denied certiorari (357 U. S. 905).

Application was then made to the United States District Court for the Southern District of New York for a writ of habeas corpus (28 U. S. C. § 2241 *et seq.*). The writ was issued and, after hearing, was dismissed with "great reluctance" on the basis of the District Court's conclusion that, although the relator's detention was "patently unconstitutional," it was powerless because of the alleged failure by Noia to exhaust the formerly available remedy of direct appeal (183 F. Supp. 222). The Court of Appeals reversed, one judge dissenting, and a *sua sponte* application for reconsideration *in banc* was denied by a six to three vote of the full court.

Argument

A consideration of the petition in this case must be grounded upon a recognition of the fact that a flagrant violation of Noia's right to due process of law appears affirmatively upon the face of the record and has not been contested by the Petitioner. However, the Petitioner, on the basis of three legal concepts, namely (1) Exhaustion of State remedies; (2) Waiver or forfeiture; and (3) Adequacy of State grounds, argues that the Court of Appeals should have denied relief in spite of the clear violation of Noia's constitutional rights. What the petition fails to state or recognize is that, as to all three procedural principles which the Petitioner relies on to deny justice to Noia, the Court of Appeals upheld the legal contentions which the Petitioner presents here. However, the Court of Appeals found, upon the particular facts, special circumstances which bring this case within well recognized exceptions to the general principles relied upon by the Petitioner. As this Court stated in *Frisbie* v. *Collins*, 342 U. S. 519, 520-521, in rejecting a similar contention by a State:

> "Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals."

Here the district court recognized the basic injustice in denying relief from the "patently unconstitutional detention." For this reason it denied relief with "great reluctance." What the district court did not recognize, and what the Court of Appeals did correctly realize, was the clear application to the facts of this case of the above principle enunciated by this Court in *Frisbie* v. *Collins*, *supra*. For these reasons, review by this Court is not warranted.

1. Exhaustion of State Remedies

Prior to the decision in this case, the Court of Appeals for the Second Circuit had specifically left open the question of whether 28 U. S. C. § 2254 referred to presently or formerly available remedies. *U. S. ex rel. Wissenfeld* v. *Wilkins*, 281 F. 2d 707, 711-712 (1960). See also Mr. Justice Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, William H. Leary Lecture, October 26, 1961 (apparently unpublished); Hart, *The Supreme Court, 1958 Term: Foreward: The Time Chart of the Justices*. 73 Harv. L. Rev. 84 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961).

Notwithstanding this authority, the court below did not find in Noia's favor on the question of whether Section 2254 refers to presently or formerly available remedies. The court assumed the latter requirement—adversely to the Noia—but found sufficient unique and compelling facts upon which to invoke the universally recognized "special circumstances" exception to the statutory requirement.

2. Waiver of Forfeiture

The Court of Appeals has found that Noia did not waive or forfeit his claim by failure to appeal from the judgment of conviction. This determination was based upon the majority's appraisal of the totality of the circumstances surrounding Noia's failure to appeal.

At some unspecified time within the thirty days within which a notice of appeal could have been filed Noia consulted with his trial counsel in the county jail. The attorney testified at the hearing below that at this consultation Noia was very upset for having been convicted of a crime he claimed he did not commit (R. 57); that Noia always maintained his innocence (R. 60); that Noia was without funds to

retain appellate counsel (R. 54-58); that he, Noia's counsel, felt that the conviction was unjust but that he did not think it his duty to file a notice of appeal to protect the defendant if he later changed his mind and obtained the money necessary to perfect the appeal (R. 61). Counsel also discussed with Noia the "Hull Case" which involved a defendant who received a life sentence, had his conviction reversed on appeal and was sentenced to death upon retrial (R. 59).[3]

From this testimony, the court below found that there had been no conscious waiver by Noia of his right to be tried without the use of the coerced confession.

Judge Moore, in his dissenting opinion does not disagree with the majority in its holding that the question of waiver must turn upon the particular facts in a given situation. Rather the dissent seems to be based upon the failure of the court below to return the case to the District Court for specific findings of fact (See opinion, Appx. to Pet., pp. 47-48).

Not even passed upon by the Court of Appeals was the question of whether the waiver doctrine has any application at all to the facts of this case.[4]

---

[3] It should be noted that the trial judge had told Noia immediately prior to imposition of sentence that he had made up his mind to send Noia to the electric chair but that on the morning of sentence his (the judge's) wife had pursuaded him to be merciful and impose a sentence of life imprisonment (F. 2262).

[4] It was urged by the relator in the court below that the use of a confession, coerced as a matter of law, is a jurisdictional defect. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *Burns* v. *Wilson*, 346 U. S. 844, dissenting opinion, Frankfurter J. (1953) and that the use of a coerced confession deprives the trial court of "particular" jurisdiction (i.e., the power to proceed to judgment). Cf. *Frank* v. *Mangum*, 237 U. S. 309, at 347, dissenting opinion, Holmes, J. (1915). If the use of a coerced confession results in a loss of jurisdiction then it cannot be waived by failure to appeal if the coercion appears affirmatively on the face of the record. Cf. *In re Snow*, 120 U. S. 274

3. Adequacy of the State Grounds

Both the majority and dissenting opinions in the Court of Appeals assume the applicability of the doctrine of "independent and adequate state grounds" to *habeas corpus* proceedings. The heart of the opinion below lies in Judge Waterman's statement:

> "In determining whether the relevant state ground is a reasonable bar to federal rights—or whether the case is sufficiently exceptional so as to excuse an earlier omission of a state procedure—the federal courts should consider the clarity and the magnitude of the substantive federal right violated. The reasonableness, and hence the adequacy of the state procedural bar, is inversely proportionate to the importance of the federal right and the clarity of its violation." (Appx. to Pet., p. 31.)

The majority then found the clarity and the magnitude of the violation of Noia's rights so extreme that the procedural bar was unreasonable or insufficient to preclude consideration of the violation of his substantive federal rights. Neither Judge Moore, in his dissenting opinion (Appx. to Pet., p. 54), nor the petitioner herein (Pet., pp. 17, 18), disputes that the adequacy of a state procedural ground is open to question in an *habeas corpus* proceeding; but they would, on the facts in this case, find the state ground adequate and reasonable.

(1887); *Neilsen, Petitioner*, 131 U. S. 176 (1889). It was relator's contention in the court below that the coercion appeared on the face of the record and consequently the trial court had lost jurisdiction. Thus, the judgment, interposed by the Warden of Greenhaven Prison as a defense to the habeas corpus petition, was void. *Brown* v. *Mississippi*, 297 U. S. 278, 286-287 (1936); *Blackburn* v. *Alabama*, 361 U. S. 199, 210-211 (1960). Contrast Noia's showing on the face of the record of a violation of the Constitution with the failure of the petitioners in *Daniels* v. *Allen*, reported *sub nom. Brown* v. *Allen*, 344 U. S. 443, 482-485 (1953) and *Michel* v. *Louisiana*, 350 U. S. 91 (1955) to preserve their claims by making a showing of the violation of their rights in the state court trial record.

Not passed upon by the court below was the question of whether the doctrine of "independent and adequate state grounds" has any application to habeas corpus proceedings. This Court, in two cases has clearly implied that this doctrine only applies to the power of this Court on direct review of judgments or orders of state courts. *Darr* v. *Burford*, 339 U. S. 200, 208-209 (1950); *Young* v. *Ragen*, 337 U. S. 235, 238 (1949). These decisions are consistent with the nature of the Writ which lies to challenge the lawfulness of detention, not the correctness of any particular state court decision.

The petitioner herein suggests that the decision below will result in a breakdown of the appellate procedures enacted by the states, destroy something which goes to the structure of our federal system without good reason, and let loose a deluge of habeas corpus applications upon the district courts. Answering these suggestions in order—

First, for a defendant to avail himself of the holding in this case, he must consciously abandon all claims of reversible error under state law; he must give up every claim that rests upon disputed facts; and then he must convince the district court that his is, "The unusual case • • • in which at the very outset it is obvious that on the substantive merits • • • the prisoner should not be imprisoned, and those merits are of constitutional magnitude" (Appx. to Pet. p. 33).

As Judge Waterman noted: "The unique fact pattern in this case is such that few prisoners will find release of Noia to have any applicability to their situations (Appx. to Pet. p. 36).

Second, New York has been given the opportunity to correct the wrong done this man who has sat for twenty years in prison under a conviction based on *no* lawful evidence. The fact that New York provides no relief does not mean the federal courts are powerless to vindicate a clearly established federal right.

Finally, it is hopefully expected that there are few New York (or other) state prisoners whose constitutional rights have been so grossly and cavalierly violated that they may rely upon the decision below in seeking relief in the Federal district courts. But, if there are such persons, they are entitled to relief whether it be by deluge or trickle.

The decision of the court below recognizes the initial and preeminent position of the state courts in the enforcement of the criminal law and the protection of fundamental rights. However, in the peculiar facts of this case, the court below found well recognized exceptions to the general rules of law urged here by the petitioner as grounds for review and the result reached below is an eminently just one which does not require further review by this Court.

The majority decision of the Court of Appeals has corrected a manifest injustice which, under a civilized judicial system, cannot be permitted to continue.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of Edwin M. Fay for a writ of certiorari be denied and the petition of the People of the State of New York be dismissed.

Respectfully submitted,

Leon B. Polsky,
The Legal Aid Society,
100 Centre Street,
New York 13, New York,
Attorney for Respondent.

April 1962.

(1145)

IN THE

Supreme Court of the United States

No. [redacted] October Term, 1961

5-1

UNITED STATES OF AMERICA, *ex rel.*
CHARLES NOIA,

Respondent,

against

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

BRIEF, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

No. 809—October Term, 1961

UNITED STATES OF AMERICA, *ex rel.*
CHARLES NOIA,

Respondent,

against

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners.

BRIEF, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR CERTIORARI

Convicted in 1942 of Murder in the First Degree, the respondent, together with two co-defendants was sentenced to life imprisonment. Although his co-defendants appealed from the judgment of conviction (thereby setting in motion a chain of legal proceedings which ultimately resulted in the dismissal of the indictment against one co-defendant and the vacatur of the judgment against the other) the respondent, after consulting counsel, decided not to appeal therefrom.

In 1960, however, respondent petitioned the United States District Court for the Southern District of New York for a writ of *habeas corpus*. The District Court, after hearing

argument, dismissed the petition upon the ground that respondent had failed to exhaust his State Court remedies. By a judgment entered on February 7, 1962, the United States Court of Appeals for the Second Circuit reversed the order dismissing the petition for *habeas corpus*. Petitioners now seek a writ of certiorari to review the judgment of the United States Court of Appeals.

Applicable Statutory Provisions

(1) Title 28, Section 2254, United States Code:

> "An applicant for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(2) New York Code of Criminal Procedure, Section 517:

> "In what cases appeals may be taken by defendant. An appeal may be taken by the defendant as of right from a judgment of conviction in a criminal action or proceeding as follows:
>
> 1. • • •;
>
> 2. Where the judgment is other than of death in the City of New York (a) to the Appellate Division of the Supreme Court of the department in which the conviction was had, from a conviction by the Supreme Court or by the Court of General Sessions of the County of New York or a County Court, or from a conviction

by a Court of Special Sessions; (b) to the Appellate Part of the Court of Special Sessions, from a conviction by a City Magistrate;

"• • •."

Question Presented

Under the provisions of Section 2254 of the United States Code does the failure of the respondent to appeal from judgment of conviction now bar him from obtaining a Federal writ of *habeas corpus?*

Argument

We submit that the requirements of Title 28, Section 2254, United States Code, mandate an exhaustion of State remedies as a condition precedent to invocation of Federal jurisdiction.

In *Brown* v. *Allen*, 344 U. S. 443 (1953), this Court considered at some length the question of the exhaustion of State remedies, required by 28 U. S. C. § 2254. While it held that repetitious applications to State courts were not required, it apparently concluded that a federal question must be presented to the State courts by at least *one* post-conviction procedure, where an adequate remedy was available in such courts (pp. 448-9).

Interestingly enough, the Court below has heretofore strictly adhered to the provisions of § 2254. In *United States ex rel. Kozicky* v. *Fay*, 248 F. 2d 520 (1957), it held that a failure to appeal to the New York Court of Appeals from the affirmance of a judgment of conviction by the Appellate Division amounted to a failure of exhaustion of State remedies under § 2254 and, therefore, that a petition to the District Court for *habeas corpus* was properly denied.

In *United States ex rel. Martine* v. *Williams*, 174 F. 2d 582 (1949), the Court below similarly held that, in order to exhaust State remedies, the petitioner must prosecute an available appeal "to the highest New York court open to him." It stated: "As we interpret 28 U. S. C. A. § 2254, the petitioner must have exhausted the State remedies available to him at the time of filing the petition for *habeas corpus*" (p. 584). Although it found that he had exhausted the State remedies available to him by his application for a writ of error *coram nobis* in 1946, it noted that in 1947 the State statute was amended to give him the right of appeal and that his failure to perfect this right of appeal barred relief under § 2254.

In *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645 (1960) cert. den. 364 U. S. 922 (1960), the Court below held that the relator failed to exhaust available State remedies as required by 28 U. S. C. A. § 2254, by his failure to present the question of coercion for review by this Court after affirmance of the conviction by the New York Court of Appeals.

We submit that in view of the prior decisions of the Court below involving exhaustion of State remedies within the meaning of 28 U. S. C. § 2254, the State of New York should be permitted an opportunity to challenge the judgment herein.

CONCLUSION

The petition for certiorari should be granted.

Dated: Albany, New York, April 30, 1962.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962

No. 84

EDWARD M. FAY, Warden, *et al.*,

Petitioners,

—against—

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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October Term, 1962

No. 84

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Petitioners,

—against—

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court denying the application for a writ of habeas corpus appears in 183 F. Supp. 222. The reversing opinion of the United States Court of Appeals, Second Circuit, is reported in 300 Fed. 2d 345. The decisions of the New York Courts relevant to the present issue are reported in 265 App. Div. 960 sub nom. *People* v. *Bonino;* 291 N. Y. 541 sub. nom. *People* v. *Bonino and Caminito*; 297 N. Y. 882 sub nom. *People* v. *Caminito*; 307 N. Y. 686 sub nom. *People* v. *Caminito;* 309 N. Y. 950 sub nom. *People* v. *Bonino;* 1 N. Y. 2d 752 sub nom. *People* v. *Bonino;* 4 App. Div. 2d 697 sub nom. *People* v. *Caminito*; 3 N. Y. 2d 596 sub nom. *People* v. *Caminto and Noia.* Other decisions

relevant to the present issue are reported in 127 F. Supp 689 sub nom. *United States ex rel. Caminito* v. *Murphy, Warden;* 222 F. 2d 698 sub nom. *United States ex rel. Caminito* v. *Murphy, Warden;* 350 U. S. 896 sub nom. *Murphy, Warden, and New York* v. *United States ex rel. Caminito.*

Previous Proceedings

The judgment to which the petition for the writ was addressed was entered in the County Court of Kings County, New York, on March 2, 1942. It convicted appellant, Santo Caminito and Frank Bonino of the crime of Murder in the First Degree in the killing of one Murray Hammeroff during the commission of a robbery. The Court accepted the jury's recommendation of clemency pursuant to Penal Law, Section 1045-a and sentenced all defendants to a term of imprisonment for natural life.

Respondent Noia did not appeal from the judgment. This crucially important fact will be dwelt upon at length in subsequent portions of this brief.

Caminito and Bonino appealed to the Appellate Division of the Supreme Court, Second Judicial Department, which affirmed the judgment (265 App. Div. 960); and upon appeal to the New York Court of Appeals, the judgment was again affirmed (291 N. Y. 541).

At the trial, the jury were instructed concerning all defendants that the sole evidence against them was the confession by each of his participation in the robbery. The jury were further instructed that as respects respondent, his confession admitted that it was he who had fired the fatal shot. The case was submitted to the jury with regard to Caminito and Bonino only on a felony murder theory

and concerning respondent was submitted on both common law and felony murder theories. All defendants testified that their confessions were involuntary and had been wrung from them by police brutality and illegal delay in arraignment. The fact that the jury included respondent in clemency recommendation shows, of course, that he, like his co-defendants, was convicted on the felony murder theory.

In the appeals which followed, Caminito and Bonino urged upon the Appellate Division and the Court of Appeals the involuntary nature of their confessions.

Following the affirmance of the judgment by the Court of Appeals, Caminito made two motions for reargument. Both were denied (297 N. Y. 882; 307 N. Y. 686). His subsequent petition to the United States Supreme Court for certiorari was likewise denied (Black and Douglas, *JJ.* dissenting; (348 U. S. 839)). Caminito then petitioned the United States District Court for the Northern District of New York for a writ of habeas corpus, alleging therein the same ground of coerced confession which he had presented to the State Courts and to the Supreme Court of the United States. The petition was dismissed (Foley, *D.J.*, 127 F. Sup. 689). However, upon the appeal to the United States Court of Appeals for the Second Circuit, the District Court was unanimously reversed and the writ of habeas corpus was sustained (222 F. 2d 698). New York applied to the United States Supreme Court for a writ of certiorari, but the petition was denied (350 U. S. 896).

Bonino, availing himself of the happy result which had accrued to Caminito, moved in the New York Court of Appeals for reargument of its judgment of affirmance

against him. The motion was granted (309 N. Y. 950); and upon reargument the Court reversed the judgment of conviction and ordered a new trial (1 N. Y. 2d 752).

The Supreme Court's denial of certiorari to New York in the *Caminito* case was followed by orders of the Kings County Court dismissing the indictment against him and vacating the judgment against Noia. The People appealed from both orders in a consolidated appeal and the Appellate Division reversed them both, thus effectuating the reinstatement of the indictment against Caminito and the judgment of conviction against Noia (4 App. Div. 2d 697, 698). The Appellate Division's order was affirmed upon appeal by Caminito and Noia to the Court of Appeals (3 N. Y. 2d 596).

In the Court of Appeals, Fuld, *J.* wrote on behalf of a unanimous Court:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him. As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has 'inherent power' to set aside its own judgment procured in violation of constitutional right.

Not having participated in the appeals prosecuted by his codefendants, Noia is not entitled to the beneficial results that they obtained. Some years ago, we held that the nonappealing codefendants of one whose conviction was reversed on appeal have 'no remedy * * * through the court'; the judgments recorded against them 'stand' and 'they must serve their sentences.' (People v. Rizzo, 246 N. Y. 334, 339). Their only recourse the court observed, was to the Governor for executive clemency.

Nor does the revitalization of coram nobis in this state since 1943 (see Matter of Lyons v. Goldstein, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed, as did his codefendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error coram nobis. (see, e.g., People v. Sullivan, 3 N. Y. 2d 196, 198). And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (see Davis v. United States, 214 F. 2d 594, 596 cert. denied 353 U. S. 960; Howell v. United States, 172 F. 2d 213, 215, cert. denied 337 U. S. 906). While the scope of coram nobis has been somewhat expanded beyond its original office (see e.g., People v. Shaw, 1 N. Y. 2d 30; People v. Kronick, 308 N. Y. 856), it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously, is not such a case."

Respondent then, on February 4, 1960 petitioned the United States District Court for the Southern District of New York for the issuance of a writ of habeas corpus; and on February 5, 1960 an order to show cause why such writ should not issue, directed to appellant warden, the Attorney General of the State of New York and the District Attorney of Kings County was made by Honorable Sidney Sugerman, a United States District Judge.

The District Attorney appeared in opposition on behalf of all parties to whom the order had been issued and filed an affidavit executed by Assistant District Attorney William I. Siegel on February 10, 1960. Presiding on that day was Honorable John N. Cashin, United States District Judge. As a result of the proceedings to this point, hearings were held on March 8, 1960, March 15, 1960 and March 31, 1960 before Cashin, *D.J.*

The District Court took testimony concerning the admitted fact of relator's failure to appeal from the judgment of conviction. Appellant appeared in person and by attorney at the hearing held on March 8th, March 15th and March 31st, 1960. The hearing was afforded appellant in order to give him an opportunity to present to the Court the reasons why he had not appealed from the judgment. The Court rendered its decision on April 8, 1960. In the Court's opinion, reference is made to appellant's claim, advanced at the hearing, that such omission to appeal was due to his indigence. Further reference is made in the opinion to proof adduced in respondent's (now petitioner's) behalf "which tends to show that the relator's motive for not appealing might well have been the fear that on a retrial the death penalty might be imposed". The Court wrote:

> "I prescind from making any finding on this issue since I think it is entirely unnecessary."

The decision to deny the writ of habeas corpus therefore rests squarely upon the fact "of relator's failure to exhaust his State Court remedies" (63, 66).*

The Court of Appeals reversed the order of the District Court upon considerations and for the reasons discussed in the opinion of Waterman, *C.J.*, concurred in by Smith, *C.J.*, Moore, *C.J.* dissenting.

Jurisdiction

The jurisdiction of the District Court was invoked by respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioners under Title 28, Section 2101-d, United States Code, and Rule 22 of the Revised Rules of this Court effective July 1, 1954. The writ of certiorari was granted by this Court May 14, 1962 (369 U. S. 869). Respondent had been admitted to bail of $10,000 by Mr. Justice Jackson on March 22, 1962.

Question Presented

Petitioners contend that the United States Court of Appeals erred in its judgment holding that respondent was entitled under Section 2254 of the United States Code and governing law to have issued to him a writ of habeas corpus; and in overruling the District Court's order which had dismissed the petition for the writ upon the ground that respondent had failed to exhaust his State Court remedies. It is petitioners' contention that respondent, by having failed to appeal to the Appellate Division of the New York

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* Page references herein contained are to the Transcript of Record.

Supreme Court and to the New York Court of Appeals from the judgment of conviction, had foreclosed himself from all Federal relief.

Applicable Statutory Provisions

(1) Title 28, Section 2254, United States Code:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

(2) New York Code of Criminal Procedure, Section 517:

> "In what cases appeals may be taken by defendant. An appeal may be taken by the defendant as of right from a judgment of conviction in a criminal action or proceeding as follows:
>
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>
> 2. Where the judgment is other than of death in the City of New York (a) to the Appellate Division of the Supreme Court of the department in which the conviction was had, from a conviction by the Supreme Court or by the Court of General

Sessions of the County of New York or a County Court, or from a conviction by a Court of Special Sessions; (b) to the Appellate Part of the Court of Special Sessions, from a conviction by a City Magistrate;

• • •"

(3) New York Code of Criminal Procedure, Section 519:

"519. Appeal to court of appeals from intermediate appellate court.

Upon the determination of an appeal, other than from a judgment of death, taken as provided in section five hundred seventeen or five hundred eighteen, an appeal may be taken from such determination by any party aggrieved to the court of appeals in the following cases, provided such party obtains a certificate granting permission to appeal, as provided in section five hundred twenty:

1. From a judgment or order affirming or reversing a judgment of conviction, including an order granting a new trial;
2. • • •
3. • • •
4. • • •
5. From a final determination affecting a substantial right of the defendant;
6. • • •"

Record Facts Material to the Question Presented

The Hearings in the District Court

At the hearing on March 8, 1960, no testimony was taken, the hearing being devoted to argument on the question of respondent's right to the issuance of a writ. In substance, his counsel contended that Title 28, Section 2254, United States Code, in referring to the exhaustion of State remedies, meant exhaustion of State remedies available to the defendant at the time of the presentation of the petition for the Federal habeas corpus writ (26). Petitioners answered that on the contrary the Federal statutes' basic requirement of exhaustion of State remedies meant all remedies which at any time in the past had been available to the defendant (31).

On the proceedings on March 15, 1960, petitioners' counsel conceded that with respect to respondent as well as his co-defendants at the trial, the People's case consisted solely of evidence of confessions plus the *corpus delicti* and that the trial Judge had charged the jury that if they did not find the confessions to be voluntary and/or truthful, they were obliged to acquit all the defendants (35).

Testimony was taken at the March 31, 1960 hearing. Respondent, appearing in person and by counsel, testified that he was represented at the Kings County Court trial by Louis J. Wacke, Esq., now known as Louis J. Walker. Following the conviction he did not ask anyone to file a Notice of Appeal in his behalf because of lack of funds and a disinclination to impose further upon his family, who were likewise financially unable to finance an appeal. He knew nothing of any right to appeal as a poor person (41) except where sentence was of death (42). His relative, Caesar

Cirigliano, a lawyer, later visited him in Sing Sing and told him that no Notice of Appeal had been filed in his behalf (44).

Respondent, however, conceded under cross-examination that Mr. Walker had visited him in the jail during the thirty-day period following the judgment of conviction during which he could have appealed. There was talk of such an appeal; but according to respondent, "he was talking about an appeal, but at the time I did not want an appeal" (44). This was due to his lack of funds (45).

Mr. Walker testified under call by petitioners. His practice from 1927 when he was admitted to the bar, to 1942 when he represented respondent, was substantially a criminal practice (46). He visited respondent in the Raymond Street jail during the thirty day period in which a Notice of Appeal could have been filed. Caminito and Bonino had decided to appeal from the judgment (48) and Mr. Walker asked respondent if he wished that the same step be taken in his behalf, Mr. Walker being of the opinion that "an appeal would result favorably to his case" (48). Respondent negatived the suggestion. The reason given by him to Mr. Walker goes to the very nub of the present case (49).

> "A. (Continuing) My recollection is that he gave me a couple of reasons why he did not want to appeal.
>
> Q. Do you remember what those reasons were? A. One of them was that he felt that if there was a reversal and a new trial was ordered, maybe the next jury would not recommend mercy.
>
> He also told me, in substance, that his family was very financially embarrassed and had no funds, but I do not think that was gone into too deeply. He did not want to appeal. That was it."

Mr. Walker also testified that he had advised respondent of his right to apply to the Appellate Division which upon showing of merit would permit the appeal to be heard on original typewritten records and would also assign counsel (51-52).

Respondent, according to Mr. Walker, was familiar with a contemporaneous case in which a defendant, Hull, had appealed a judgment of conviction for Murder in the First Degree with a recommendation, and upon re-trial was again convicted of that crime without a recommendation (54):

> "Q. Who proposed the Hull case to him first? A. I do not remember. I remember it was discussed. I remember every question that this man asked me as to his position, what would happen if a reversal came, could it happen like that case, maybe he would go to the chair on the second trial, and whatever was discussed I gave him a legal answer."

Finally, Mr. Walker testified, he offered to file a Notice of Appeal for respondent if he should decide within thirty days to do so. No request was ever made that it be done (56).

Respondent, recalled, denied having discussed the Hull case with Mr. Walker or having told the lawyer that his reason for not wanting to appeal was fear of the electric chair (57).

The District Court, in its opinion and decision dismissing the writ (183 F. S. 222), fully reviewed the history of the litigation with respect to all defendants, Caminito, Bonino and Noia from the time of the trial in the Kings County Court to the beginning of the instant petition for a writ of

habeas corpus by Noia. The Court also analyzed the testimony at the hearing before it. It concluded that indigency alone does not excuse a State-Court defendant's failure to appeal from a judgment of conviction. *United States ex rel. Kozicky* v. *Fay*, 284 F. 2d 520. As to the requirements of Title 28, Section 2254, United States Code, for the exhaustion of State remedies as a condition precedent to the invocation of Federal jurisdiction, the District Court held (59):

> "In one sense, of course, the relator has exhausted his state court remedies since there is no proceeding available to him in the State, apart, of course, from executive clemency, which can effect his release from a patently unconstitutional detention. However, exhaustion of state court remedies does not only mean that at the time of the petition before the Federal District Court there is no remedy available in the State. It further means that the relator has availed himself of at least one corrective process available in the courts of the state if there be such a process. (Ex parte Hawke (1944), 321 U. S. 114; Brown v. Allen (1953), 344 U. S. 443). That there was a state court process available to the relator is obvious since the codefendants have obtained their releases."

The District Court refrained from making any finding of facts concerning respondent's contentions of poverty or with respect to the proof that, on the contrary, his failure to appeal was voluntary and due to a fear of possible results. Its dismissal of the writ rested solely on the basis that (66):

> "On the reasoning in the authorities cited above I feel constrained to dismiss the writ because of relator's failure to exhaust his state court remedies."

ARGUMENT

POINT I

The petition for the writ of habeas corpus was properly denied on the ground that respondent, having failed to exhaust his state remedies, was not entitled to the writ. The Court of Appeals erred in reversing the order dismissing the petition.

Respondent's deliberate omission to appeal from the New York judgment of conviction is the pivot upon which the case at bar turns. It is our position that respondent's failure to avail himself of the remedies provided by New York's Laws granting the right of appeal (Code Crim. Pro. Sections 517, 519) automatically debarred him from invoking the Federal writ of habeas corpus. United States Code, Title 28, Section 2254 explicitly requires the exhaustion of State remedies as a condition precedent to an application for the writ. The section is a codification of the rule firmly established by this Court long prior to its enactment. In *Ex Parte Hawke*, 321 U. S. 114, this Court, in denying an application for leave to file an original petition for the writ, wrote:

> "The denial of relief to petitioner by the Federal Courts and Judges in this, as in a number of other cases, appears to have been on the ground that it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist' (citing)."

Indeed, the Revisor's note to Section 2254 points out that the section is "declaratory of existing law as affirmed by

the Supreme Court (see Ex parte Hawke, 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. ed. 572)."

This Court has not departed from the rule, the entire current of cases decided since the enactment of Section 2254 being in strict and literal conformity with the principle enunciated in *Ex Parte Hawke, supra.* The later reiteration and enforcement of the exhaustion requirement in *Brown* v. *Allen*, 344 U. S. 443, 97 L. ed. 469, 73 S. Ct. 397, illustrates its compelling force. In *Brown*, this Court was faced with a situation which, if any state of facts could justify a relaxation of the rule, constituted such justification. The appeal of a defendant under sentence of death in a State Court was dismissed by the State's highest Court because his attorneys had not served the proper statement of the case until *one day* after lapse of the required period for such service. In upholding the denial of the writ of habeas corpus, this Court wrote:

> "The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal court. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U.S.C. Sec. 2241. *That fact is not to be tested by the use of habeas corpus in lieu of an appeal.* To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime. * * *
>
> Finally, federal courts may not grant habeas corpus for those convicted by the state except pursuant to Section 2254. * * * The statute requires that the applicant exhaust available state remedies. *To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ.*" (Italics ours)

Not long after *Brown*, this Court considered the same question in *Michel* v. *Louisiana*, 350 U. S. 91, also a capital case. The defendant had failed to comply with State procedure in that he had not objected to the legality of the Grand Jury (on the ground of systematic exclusion of Negroes from the panel) during the three judicial days following the end of the Grand Jury's Term. Even though he did so on the fifth day, this Court refused to entertain the case despite the dissent by Mr. Justice Black in which he asserted that historically only one Negro had ever been selected to serve on a Grand Jury in that parish.

It is notable that in both *Brown, supra*, and *Michel, supra*, the State Court defendants had at least attempted to fulfill State procedural requirements and had failed only narrowly to do so with complete sufficiency. Respondent in the case at bar has by contrast voluntarily and completely refused to avail himself of the appeal rights which were his absolutely under Code Crim Pro. Section 517 and conditionally under Section 519.

The United States Court of Appeals for the Second Circuit has in its decisions heretofore paralleled the rulings of this Court in governing itself according to Section 2254 (*United States ex rel. Martine* v. *Martin*, 174 F. 2d 582; *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645, cert. den. 364 U. S. 922; *United States ex rel. Kozicky* v. *Fay*, 284 F. 2d 520; *United States ex rel. Kling* v. *LaVallee*; 306 F. 2d 216). Indeed, in *Kozicky, supra*, Waterman, *C.J.* (the author of the majority opinion in the case at bar) wrote for a unanimous Court:

> "If the State provided such a remedy, (i.e., an appeal) and the petitioners failed to take advantage of of it, we hold they cannot obtain a writ of habeas

> corpus from a Federal Court. This result is a necessary consequence of 28 U.S.C.A. Section 2254. • • • But, where the failure of the prisoner to obtain relief is due to his own inaction, 28 U.S.C.A. Section 2254 prohibits intervention by the Federal Courts."

Williams, supra, and *Kling, supra,* illustrate the literal strictness with which the rule has been applied. In *Williams,* the State defendant did in fact appeal to this Court upon a constitutional question certified by the New York Court of Appeals. He did not, however, procure a certification of the question of coerced confession to be presented on the appeal, nor did he seek certiorari in order to present that question to this Court. He contented himself with presenting to this Court only the question certified by the State Court of Appeals as to whether or not a sentencing Court may utilize ex-parte evidence in order to determine if it should follow the jury's clemency recommendation in a capital case. The Second Circuit held:

> "In so limiting the issues assigned counsel for relator made the choice of assuring their client, as a matter of right, Supreme Court review of the one appropriate question (sentencing procedure) rather than risking discretionary certiorari review of both federal questions (sentencing procedure plus coercion). That choice resulted in a failure to exhaust state remedies because the remaining question, having been previously heard by the state courts, should have been thereafter offered for review to the Supreme Court. This was not done and hence the coercion question was not properly before the District Court. Darr v. Burford, 239 U. S. 200 (1950); Ex parte Hawke, 321 U. S. 114 (1944)."

In *Kling, supra*, the Second Circuit held that a New York State convict was not entitled to the Federal writ of habeas corpus because he had not moved in the Appellate Division to vacate that Court's order dismissing his appeal from an order denying a motion in the nature of the writ of error coram nobis; the dismissal occurring after the Court had on the ground of lack of merit in his appeal denied his motion for leave to proceed as a poor person. The Second Circuit pointed out that as a result of decisions in the New York Court of Appeals (*People* v. *Borum*, 8 N. Y. 2d 177), the Appellate Division in a long line of cases had:

> "granted all motions to vacate its previous orders dismissing appeals which were entered after the appellant had first moved unsuccessfully for leave to appeal as a poor person." (Citing among others, *People* v. *Abair*, 13 App. Div. 2d 802.)

The Second Circuit wrote:

> "In any event, as long as this remedy is available, we believe Kling should not pursue Federal habeas corpus. This is not an exercise in futility and frustration. It is a recognition of the principle that 'it would be unseemly in our dual system of government for a federal District Court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation * * *'. (Darr v. Burford, 339 U. S. 200, 204, 1950; see United States ex rel. Buckley v. Wilkins, 2d Cir., June 15, 1962, and cases cited therein). Therefore, we hold that Kling has failed to exhaust his available state remedies within the meaning of 28 U.S.C., section 2254, and that his petition must be dismissed for that reason (cf. United States ex rel. Allen v. Murphy, 295 F. 2d 385, 386, 2d Cir., 1961)."

True, the rule has been relaxed on rare occasions, but only under strictly limited circumstances. *Thomas* v. *Arizona*, 356 U. S. 290; *Frisbie* v. *Collins*, 342 U. S. 519. This Court in *Brown* v. *Allen*, *supra*, itemized the limited instances of exception:

> "Of course, federal habeas corpus is allowed where time has expired without appeal when the prisoner is detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials."

See *Dowd* v. *Cook*, 340 U. S. 206; *Johnson* v. *Zerbst*, 304 U. S. 458.

The Second Circuit added these other exceptional cases in *Williams*, *supra*:

> "That exception generally applies where the State determination is on non-federal grounds, e.g., a procedural bar within the state appellate process, from which certiorari jurisdiction cannot be invoked. White v. Ragan, 324 U. S. 760 (1945). It may also apply in certain situations, not applicable to the instant petition, where the State has been tardy in objecting to the federal proceedings or where the circumstances are such that prompt federal intervention is essential."

Respondent brought himself within none of the exceptional cases enumerated in *Brown* v. *Allen*, *supra* and *Williams*, *supra*.

In his brief in the Court below he urged that his failure to seek appellate review in the New York Courts should be excused because of the existence of "a combination of factors, viz. lack of funds to retain counsel, defendant being upset at the time of his last interview with counsel

after the verdict, the failure of counsel to undertake the appeal without payment despite his belief in his client's innocence." A synonymous restatement of this plea would be (1) indigency; (2) inability to make a clear choice; and (3) lack of counsel. In anticipation that the same claims may be pressed upon this Court, we answer them *seriatim*.

(1) Even if the record of the hearing in the District Court sustained a claim of indigence,—which it does not,—the Second Circuit itself has held in *United States ex rel. Williams* v. *LaVallee, supra*.

> "In any event, indigence is not the extraordinary circumstance envisaged as the exception to the rule of Darr v. Burford, *supra*."

Accord:

United States ex rel. Kozicky v. *Fay, supra*.

The District Court, although refraining from making a finding of fact on this issue, did state in its opinion:

> "that absolutely no evidence of the indigency of relator's family was adduced at the trial except the relator's conclusory statement, despite the fact that there were several spectators at the hearing who were presumably relatives of the relator. In addition, absolutely no explanation was offered by relator for his failure to proceed to adduce any such evidence of indigency."

(2) The plea of "inability to make a clear choice" has no foundation other than the statement of his trial counsel in the District Court that respondent was "upset by the jury's verdict" (53). Surely this observation by counsel, —even if it was an accurate description of respondent's

emotional condition,—is an insufficient basis upon which to permit an infraction of the rule of exhaustion of State remedies, by now decades old. To do so would indeed be to set but little store upon the weighty principles, involving the very federal structure of this nation, upon which the rule has always been grounded.

(3) The assertion that respondent did not appeal from the judgment of conviction because of lack of counsel is refuted by the record. His trial counsel testified in the District Court that although he had discussed the matter of an appeal with respondent during the period when an appeal would be timely, and although he had expressed the opinion that "an appeal would result favorably to his case" (48), appellant had refused to appeal. One of the reasons for that refusal was "that his family was very financially embarrassed and had no funds (49)." Significantly however, counsel added: "But I do not think that was gone into too deeply. He did not want to appeal. That was it" (49). Counsel also testified that he had informed respondent that under the practice of the Appellate Division, the appeal could be heard on original typewritten records and that the Court would assign counsel (51-52). The real reason for respondent's disinclination to appeal lay, of course, in his fear that upon re-trial he might be sentenced to death (49).

The rule requiring exhaustion of State remedies as an absolute prerequisite to the issuance of the Federal writ of habeas corpus was developed by this Court, and ultimately codified by Congress into Section 2254, because of constitutional considerations of utmost importance. In *Darr* v. *Burford*, *supra*, the Court thus expounded the pur-

pose and effect of both the original 1867 habeas corpus statute and the exhaustion of State remedies doctrine:

> "This favorable attitude toward procedural difficulties accords with the salutary purpose of Congress in extending in 1867 the scope of federal habeas corpus beyond an examination of the commitment papers under which a prisoner was held to the 'very truth and substance of the causes of his detention'. Through this extension of the boundaries of federal habeas corpus, persons restrained in violation of constitutional rights may regain their freedom. But since the 1867 statute granted jurisdiction to federal courts to examine into alleged unconstitutional restraint of prisoners by state power, it created an area of potential conflict between state and federal courts. As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Mr. Justice Frankfurter expressed it with his usual felicity of phrase in *Irvin* v. *Dowd*, 359 U. S. 309, 408:

> "Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this court has general discretion to see justice done. Nor is it one of those 'technical' matters that laymen, with more confidence than understanding of our constitutional system, so often distain."

Mr. Justice Harlan thus stated the rule in the same case:

> "It is clear that the Federal Courts would be without jurisdiction to consider petitioner's constitutional claims on habeas corpus if the Supreme Court of Indiana rejected those claims because irrespective of their possible merit, they were not presented to it in compliance with the State's 'adequate and easily-complied-with method of appeal.' Brown v. Allen, 344 U. S. 443, 485 (339 U. S. at 412-13)."

In the face of the strong *caveat* expressed in Section 2254, in the decisions of this Court, in its own decisions, and despite the constitutional doctrine of high import involved, the Court below by its majority has nevertheless held respondent to be entitled to be succored by the Federal writ from the consequences of his affirmative refusal to avail himself of State remedies. The question presents itself: Why this departure from principle and practice?

The majority of the Court examined three bases upon which to consider the problem and through which to reach a result running counter to all previous authority. We analyze them *seriatim*.

The majority, referring first to what it termed the problem of waiver, wrote (73):

> "The first question before us is whether inasmuch as his conviction was not appealed, Noia waived his undeniable constitutional right of being tried without his coerced confession in evidence. The answer to this question is to be determined according to federal law."

With great deference to the learned majority, it is our submission that this constitutional right to be tried free

of a coerced confession was not the right involved in the case. What was involved was the right to avail himself of the absolute State right to appeal from the judgment of conviction,—a *right* which at the same time was transmuted into an *obligation* to appeal by the doctrine of exhaustion and by Section 2254. While the majority's learned discussion of the abstract doctrine of waiver may be accurate in those cases to which it applies, it is beside the point with respect to the state of facts before the Court. Again with great respect to the learned majority, we believe that the weakness in their application of the doctrine of waiver is pointed up by the amplification thereof in the opinion which now follows (75):

> "At the time Noia made his choice not to appeal, he had just been convicted by a New York court and jury solely upon the confession which had been wrung from him. But it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment. The police at the trial only admitted to extracting his acknowledgment of guilt by methods far more subtle than brute force. And even if Noia had succeeded in obtaining a reversal, he faced the possibility of a new trial in which he might be convicted again and receive the death penalty instead of life imprisonment. He had just received very shoddy treatment at the hands of the New York police—treatment that he then believed was approved by judicial authorities. Why should he expect a better brand of justice from the same authorities in the future? The posture of his case was far different immediately following the trial than it is now as a result of the intervening event which we have outlined above. We cannot believe that Noia would consciously and willingly have surrendered his constitutional right had he known

> then what he knows now: that there had been an undoubted violation of this right and the rectification of the wrong done him would mean his freedom, not his death. Perhaps Noia should be denied relief for some other reason, which we will discuss presently, but surely not because of any conscious or intentional waiver on his part of a right known to him to have his conviction set aside because that conviction had been obtained by depriving him of a constitutional right."

We ask: Since when has it rested with a criminal defendant to estimate the degree of probability of "even-handed administration of justice by the Courts? By what doctrine of either law or ethics is a criminal defendant to be empowered to prophesy the ultimate resolution of a judicial problem by the Courts? To put it with due mildness, a society in which the judgment and discretion of a criminal defendant on such fundamental problems is sufficient to oust State Legislatures of their functions and powers, and State Courts of their jurisdiction, would be a society based on anarchy rather than on order. We cannot hope to improve upon either the rationale or the expression of Judge Moore's dissent in the Court below; and therefore we quote from it *in extenso* (112):

> "The opinion of the majority could have been written in one sentence substantially, as follows: 'In any criminal case in a State court wherein a confession was introduced and a conviction resulted, the defendant may, at any time thereafter without appealing such conviction or exhausting any other available state remedy, claim upon petition for a writ of habeas corpus that such confession was coerced and, upon a finding to that effect by a federal judge, a writ shall issue to the State directing the defendant's

release from custody (citing cases if there be any).' If this is to be the rule of law, is not a reappraisal of our criminal procedure in this field called for? If the delicate balance of the State-Federal relationship is to be upset, possibly the majority's approach is best, namely, upset it drastically. If each case is to be decided on its own 'exceptional situation' basis, let this principle be declared so that consideration of the scores of habeas corpus appeals which come before this court every year can be unfettered by legal principles. No longer will it be necessary after due deliberation to write 'Failure to exhaust State remedies' or 'No federal question.' And in fairness to the two distinguished appellate courts in New York, would it not be better to advise them that in any case before them involving a coerced confession they are but puppets whose strings may be cut at any time by the keen edge of the 'Great Writ'. It may well be that there should be a definite rule that no case involving an allegedly coerced confession should be tried in a state court or, stated differently, that such a case should be tried only before a federal judge. Whether this should be is for those far more learned in such matters than I to determine. I point out only that such is not the law at the present time—at least until the filing of the majority opinion.

I would affirm.

The majority of the Courts below then considered that aspect of the case involving the exhaustion of State remedies and concluded (86):

"We believe that if there are facts in a case so unique as to make an independent state ground of decision, elsewhere reasonable and adequate, inade-

> quate in that particular case to bar federal habeas corpus, those facts are likewise sufficient to create an exceptional case within the contemplation of section 2254 so as to permit the issuance of the federal habeas corpus writ."

Here again Judge Moore's dissent is, we submit, unanswerable (108):

> "I do not contend that state procedural grounds for denying a hearing to federal claims must always be considered adequate to preclude federal review of that claim. Certainly, a procedural ground will not bar federal review if the state procedure discriminates against the assertion of federal claims, Williams v. George, 349 U. S. 375, 1955; Ward v. Love County, 253 U. S. 17, 1920; NAACP v. Alabama, 357 U. S. 449, 1958, or unreasonably prevents the assertion of federal rights, Davis v. Wechsler, 263 U. S. 22, 1923; Rogers v. Alabama, 192 U. S. 226, 1904; Reece v. Georgia, 350 U. S. 85, 1955; Staub v. City of Baxley, 355 U. S. 313, 1958. However, inadequacy must be determined according to principles established by the Supreme Court. Since Daniels v. Allen has established that the failure to take an appeal is a reasonable ground for a state's refusal to entertain constitutional claims, we should not now hold that the failure to appeal is not a reasonable ground for denying a hearing to such claims unless the petitioner did not have an 'opportunity to appeal because of lack of counsel, incapacity, or some interference by officials.' Daniels v. Allen, 344 U. S. at 485. However, the petitioner here had a hearing before the district court at which he was afforded an opportunity to present facts which might have excused his failure to appeal. After weighing the proof, the district court found that 'the hearing utterly failed to reveal any such circumstances.'"

Lastly, the majority turned to that phase of the case which they denominated as "the independent and adequate State ground of decision". An examination of the opinion, however, compels the conclusion that the majority were really discussing the adequacy of State avenues of relief *presently available* to respondent at the time of the initiation of his right of habeas corpus petition. Their conclusion was expressed in striking language (91):

> "Thus we come to the last scene in this human drama. Is there an adequate state ground in this case dooming relator to life imprisonment? Our answer is No; the state ground here is inadequate. We must realize that adequacy is a term of relativity. No state ground is entitled to unqualified deference. As we noted in the last paragraph, for the state ground to be adequate, it must be reasonable."

We have called this quotation "striking language". With great deference to the majority of the Court below, it is our submission that striking as the language is, it is at the same time an expression of a human reaction completely unsupported by either legal principle or judicial precedent. As Moore, *C.J.* in his dissent recognized (105):

> "Thus, the majority has 'come to the last scene in this human drama' 'dooming relator to life imprisonment.' Legal principles having failed to produce the desired result, resort must be had to a tour de force by the fiat that 'No state ground is entitled to unqualified deference' and 'adequacy' in any event is but 'a term of relativity'. After all, 'for the state ground to be adequate, it must be reasonable,' and what could be more unreasonable than requiring a defendant to appeal?

> From here on the denouement comes rapidly. The 'simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate'."

We have, we submit, demonstrated that the majority decision in the Court below runs counter to the expressed requirements of Section 2254 and to the entire body of decisional law in this Court—and, indeed, to its own decisions. Judge Moore's dissent correctly assays what the record and the majority opinion itself demonstrates to be the reason for the controlling decision: that Noia's parlous position, contrasted with the present freedom of his co-defendants, warrants an extraordinary departure from a fundamental rule. We do not say to this Court that there does exist any degree of difference in guilt, or freedom from guilt, among the three original defendants. We do, however, strongly urge that—unless this case is to be decided upon the justice of Haroun Alraschild and not upon the basis of settled law—there has always been a pertinent and controlling difference between the procedures of Bonino and Caminito on the one hand and the procedure of this respondent on the other. We urge with equal emphasis that the difference should be implemented, not as a right of the co-defendants who have no interest in this litigation, but as a right of the State of New York whose very sovereignty is, in the important aspect of its judicial system, strongly affected: strongly and adversely by the proceedings to this point, but, we hope, strongly and beneficially affected by the ultimate decision of this Court.

We cannot believe that appellant finds, or can find, in the decision of the Court below so secure a foundation as to rest content with it as a guarantee of ultimate success in this Court. Our prophetic instinct therefore suggests to us that he will urge upon this Court that it reverse *Ex Parte Hawke, supra, Brown* v. *Allen, supra,* and all the other cases in which the rule of exhaustion of State remedies has been announced and followed; and that the Court, having reversed it, enunciated a new rule in conformity with the opinion of the majority of the Court below.

That appellant should so argue would not be surprising since this would be a repetition of his argument in the Court of Appeals. We do not, however, anticipate that he would here succeed.

Section 2254 stands as a bar to the fruition of the argument; and for the Court to disregard the Statute would constitute an act of judicial legislation foreign to the history of this tribunal.

Moreover, nothing in respondent's case entitles him as an individual to such a major innovation. We realize that there is no mathematical equation which can serve as a basis for the establishment of constitutional or statutory law. Nevertheless, it is a fact that the seven Judges of the New York Court of Appeals unanimously differed from the two Federal Judges herein involved in their judicial reactions to the exigencies of respondent's situation (see opinion of Fuld, *J.*, for a unanimous Court, 3 N. Y. 2d 596, p. 4, *supra*).

And finally, it is beyond the need of argument that the sovereignty of the States, of maximum importance in the Federal structure of this nation, should not be infringed

upon or diminished except upon compelling necessity, determined to exist within the framework of constitutional law. Such necessity does not exist. The rule of exhaustion of State remedies, having worked well for upwards of a quarter of a century (*Ex Parte Hawke, supra*), should not now be changed solely for the reasons relied upon by the majority of the Court below.

POINT II

The order appealed from should be reversed and respondent should be remanded to the custody of the petitioner under the original judgment of conviction of the Kings County Court.

Dated: Brooklyn, New York,
October 1962.

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 84

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

—against—

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT CHARLES NOIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 84

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

—against—

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT CHARLES NOIA

Opinion Below

The decision of the United States District Court for the Southern District of New York dismissing the writ of habeas corpus is reported at 183 F. Supp. 252. The opinion of the Court of Appeals for the Second Circuit, reversing the District Court, is at 300 F. 2d 345.

The Court below denied without opinion a request for reconsideration *in banc*; Chief Judge Lumbard, Judges Moore and Hays voting for reconsideration and Judges Clark, Waterman, Friendly, Smith, Kaufman and Marshall against.

Jurisdiction

The jurisdiction of this Court has been invoked by Petitioners under 28 U. S. C. §2101(d). Jurisdiction over the Petition of Warden Fay lies under 28 U. S. C. §1254(1).

A writ of certiorari was issued by this Court on May 14, 1962 (369 U. S. 869).

Questions Presented

I

May a federal court entertain and determine the merits of a state prisoner's application for habeas corpus relief where the prisoner failed to pursue a formerly available state remedy and there is now no state remedy available?

II

Should the Court reconsider and limit the scope of its decision in *Brown* v. *Allen*?

Applicable Constitutional and Statutory Provisions

(1) Constitution of the United States Amendment XIV

* * *

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

(2) *Title 28 United States Code Section 2241.*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

• • •

(c) The writ of habeas corpus shall not exend to a prisoner unless—

• • •

(3) He is in custody in violation of the Constitution or laws or treaties of the Unite' States;

• • •

(3) *Title 28 United States Code Section 2243.*

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

• • •

The Court shall summarily hear and determine the facts and dispose of the matter as law and justice require.

(4) *New York Code of Criminal Procedure, §543.*

1. Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, or finding of fact, correct the judgment to conform to the verdict, or finding; in all other cases they must either reverse or affirm the judgment or order appealed from or reduce the sentence imposed to a sentence not lighter than the minimum penalty provided by law for the offense of which the

defendant or defendants have been convicted and in cases of reversal, may, if necessary or proper, order a new trial.

• • • •

ARGUMENT

POINT I

A Federal Court may entertain a state prisoner's application for habeas corpus relief from a void judgment even though the prisoner failed to pursue a formerly available state remedy and there is now no state remedy available.

Recent controversy concerning the meaning, effect and correctness of the decisions of this Court in *Brown* v. *Allen*, 344 U. S. 443 (1953) and *Irvin* v. *Dowd*, 359 U. S. 394 (1959) point up the problems involved in this case.*

There appear to be three possible theories from which it may be argued that a federal court lacks the power to grant Charles Noia relief: (A) Exhaustion of State Remedies; (B) Waiver of Forfeiture; and (C) Adequate State Grounds. Each of these theories is separate from the others, flows from a different source and contain differing qualifications to the rules governing their general applicability.

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* See generally Professor Hart's criticism of *Irvin* v. *Dowd*, in *The Supreme Court, 1958 Term: Foreward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959) and Judge Thurman Arnold's reply, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298 (1960); Professor Reitz's *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961); and *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 Univ. of Pa. L. Rev. 461 (1960); and Mr. Justice Brennan's, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423 (1962).

In the discussion below, limited to the power of a federal court, Relator claims that the statutory requirement of exhaustion of state remedies has been or should be deemed to have been complied with; that the judicial rule of waiver is inapplicable to this case; and that the presumably constitutional rule of adequate state grounds has no application to habeas corpus cases.

A. *Exhaustion of "available" state remedies refers to presently available remedies*

The initial federal habeas corpus act empowering the district court to award the writ in favor of state prisoners restrained of their liberty in violation of the Constitution and laws of the United States contained no provision relating to a requirement of exhaustion of state remedies (14 Stat. 385). During the period between 1867 to the passage of the present statute in 1948, there developed the judicially created doctrine of abstinence now codified in Section 2254 of Title 28 U. S. Code.

The first significant case involving the doctrine arose in Georgia out of the state prosecution on an indictment charging perjury before a Federal Grand Jury. *Ex parte Bridges*, 2 Woods 428, 4 Fed. Cas. 99, No. 1,862 (E. D. Ga. 1875). After conviction, but prior to a state appeal, the defendant sued out a writ of habeas corpus in the United States District Court for the Eastern District of Georgia claiming that the state court lacked jurisdiction over the offense. The Court sustained the writ although noting:

> "The question for consideration . . . might have been determined elsewhere, and probably before now, had a different course been pursued in the state court; had the petitioner, Bridges, on his arraignment there, demurred for want of jurisdiction appearing on the face of the record; or shown these facts in evidence

> on a plea of not guilty; or on a return of the verdict moved in arrest of judgment; and, if in any of these instances . . . the decision was adverse to him he could have carried the case to the State Supreme Court and if that Court affirmed the judgment of the lower tribunal still he had the privilege to sue out a writ of error from the Supreme Court of the United States and have the question re-examined there" (4 Fed. Cas. at p. 100).

On appeal to the Circuit Court, the decision of the District Court was affirmed in an opinion by Circuit Justice Bradley who indicated that it might be "a wise amendment to the law" to hold a defendant to his writ of error before intervention (4 Fed. Cas. 104, 106).

The next step in the formulation of the exhaustion rule came in *Ex parte Royall*, 117 U. S. 241 (1886). There the petitioner was held by Virginia authorities pending trial on an indictment charging violation of allegedly unconstitutional state statutes. The writ had been denied by the United States Circuit Court and upon writ of error from the Supreme Court the Court found that although the federal courts had the *power* to issue the writ, it had discretion to refrain from the exercise thereof in advance of trial in the state courts. The Court said further that even after trial and conviction the defendant could still be held to his writ of error in the state courts, although this too was again a matter of discretion, citing *Ex parte Bridges*, *supra*. At the same term a motion for permission to file an original petition for habeas corpus was denied to a defendant who had been convicted in Michigan but who still had his writ of error available in the state system. *Ex parte Fonda*, 117 U. S. 516 (1886).

Thereafter the discretionary nature of the refusal to intervene was repeatedly emphasized in cases involving applications made prior to trial: *Cook* v. *Hart*, 146 U. S. 183 (1892); *New York* v. *Eno*, 155 U. S. 89 (1894); and in cases after trial but prior to suing out a writ of error: *In re Duncan*, 139 U. S. 449 (1891); *In re Wood*, 140 U. S. 278 (1891) and *In re Frederich*, 149 U. S. 70 (1893).

The problems arising under the rule of exhaustion and abstinence appear intermittently in the pages of the United States reports over the next forty years. Three cases, *Tinsley* v. *Anderson*, 171 U. S. 101 (1898). *Urquhart* v. *Brown*, 205 U. S. 179 (1907), and *Mooney* v. *Holohan*, 294 U. S. 103 (1935) warrant particular consideration notably because they were relied upon in *Ex parte Hawk*, *infra*, the case upon which the present statute is based.

In the *Tinsley* case a circuit court dismissal of a habeas corpus petition was affirmed on the ground that an appeal was still pending within the state system. Oddly enough the appeal through the state system and thence to this Court via writ of error arrived simultaneously with the appeal from the circuit court's refusal to grant the writ. Relying upon *Ex parte Royall*, *supra*, the Court affirmed the habeas denial and then proceeded to the merits of the claim on the writ of error to the state court.

Urquhart v. *Brown*, *supra*, reversed a circuit court order sustaining the writ on the ground that relator had failed to completely exhaust his "state" remedies by taking out his writ of error from the United States Supreme Court to the Supreme Court of Washington. That such a remedy was then still available was emphasized by the Court's reversal.

> "With liberty to apply for a writ of error to review the above judgment of the Supreme Court of Washington" 205 U. S. at p. 183.

Mooney v. *Holohan, supra*, was an original application to the Supreme Court on the grounds of perjured testimony knowingly used by the prosecutor. Several abortive attempts to raise this question in the California state court had been denied because the remedies pursued were inappropriate. When the case was presented to this Court, it was found that a state habeas corpus procedure, not resorted to by the petitioner, was probably still available in California. In denying the original petition, without prejudice, it was held:

> "... before this Court is asked to issue a writ of habeas corpus, in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State *may still remain open*." (Emphasis supplied) 294 U. S. at 115.

Such was the state of the rule of exhaustion in 1944 when Henry Hawk moved for leave to petition for a writ of habeas corpus. *Ex parte Hawk*, 321 U. S. 114. Hawk had been tried and convicted in Nebraska on a charge of Murder and was serving a life sentence. He claimed that he had been forced to trial with assigned counsel and had been denied a twenty-four hour continuance to obtain retained counsel. He did not appeal the conviction—a failure which was characterized in a subsequent proceeding as being "without excuse." *Hawk* v. *Olson*, 326 U. S. 271, 273-4 n. 2 (1945).

The Court in *Ex parte Hawk*, substantially relying on the cases discussed above, denied the motion on the ground that there still existed untried post conviction collateral remedies within the state system whereby the constitutional claim could be raised.

It was with this background that the present statute was enacted in 1948. The Reviser's Notes to 28 U. S. C. A. §2254

indicate that the present statutory requirement of exhaustion was merely intended to be declaratory of existing law—viz., *Ex parte Hawk*. This purpose was reiterated by the majority of the Court in *Darr* v. *Burford*, 339 U. S. 200, 211, and notes 31-33 (1950).

In not one of these cases which form the basis for the present statute was it held that antecedent failure to pursue a no longer available remedy bars federal habeas corpus under the doctrine of exhaustion of available state remedies. Clearly, in each instance, the Court's expressed recognition of the present availability of other remedies, together with the present tense language of Section 2254, negatives such an assertion.

Analysis of the plain language of Section 2254 reveals three alternative procedural prerequisites to the issuance of the writ:

1. The prisoner must exhaust his remedies available in the courts of the state; or,

2. There is an absence of available state corrective state process; or

3. "Circumstances" render the state process ineffective to protect the rights of the prisoner.

The second paragraph of the Section would appear to merge the first two alternatives by deeming the prisoner to have complied with the exhaustion requirement by a showing that there is an absence of available corrective process.

Whether or not relator may proceed under the first disjunctive requirement or under the second is immaterial. Compliance with either is compliance with the Section. The second paragraph reads:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he *has* the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967. (Emphasis supplied.)

To interpolate the word "formerly" preceding the word "available" each time it appears in the Section is to completely distort the clear present tense caste of the statute. Not only is such interpolation contrary to the language and judicial history of the Section but it creates the anomalous and artificial situation so accurately described by District Judge Cashin:

> "If a state is zealous in assuring that unconstitutional convictions are not obtained and to this end allows a post conviction remedy other than appeal, the federal court has jurisdiction to review the state court conviction no matter when this post-conviction remedy is availed of. On the other hand, if a state is far less zealous in the interests of justice and refuses any post conviction remedy on grounds which could have been raised by appeal, the federal courts are precluded from any review if an appeal be not taken. However, this is the only conclusion I can reach on a review of the decided cases" (183 F. Supp. at 227; R. 66).

Indeed had Charles Noia been convicted just across the Hudson River he would be granted relief in the state and/or federal court. See, *State* v. *Rosania*, 33 N. J. 267, 163 A. 2d 139 (1960). Rosania had been convicted of murder with a jury recommendation of life imprisonment. He did not appeal. His two co-defendants were sentenced to death and appealed through the State system and eventually obtained habeas corpus from the Third Circuit. *U. S. ex*

rel. De Vita v. *McCorkle*, 248 F. 2d 1, *cert. denied*, 355 U. S. 873 (1957).

Rosania, seeking the benefits of the *De Vita* decision sought habeas corpus in the New Jersey County Court. The writ was sustained in the trial court but reversed by the State Supreme Court. *State* v. *Rosania, supra.*

The Jersey court, "pass[ing] over all adjective questions so that it may be certain meritorious consideration is afforded to the question involved", found that the Third Circuit's basis for upsetting the co-defendant's conviction* was inapplicable to Rosania. The Court stated that if Rosania had the same meritorious claim as his co-defendants ". . . the County Court's action should be sustained; otherwise, not."

The Warden of Greenhaven Prison claims that the release of Charles Noia will destroy the delicate balance between state and federal courts. The basis of this "delicate balance" is founded upon the doctrine of comity, best expressed in the excerpt from *Darr* v. *Burford* quoted at page 22 of the Petitioner's Brief. The doctrine of comity enunciated by that case is one of comity between courts:

> ". . . one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation have had an opportunity to pass upon the matter" (339 U. S. 200, at 204 and n. 10).

This can only refer to abstinence by the federal courts while the state courts are still cognizant of the litigation or capable of entertaining collateral proceedings wherein the federal questions could be litigated.

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* One of the jurors was allegedly prejudiced on the question of imposition of capital punishment.

This was the view taken by the late Justice Holmes, dissenting in *Frank* v. *Mangum*, 237 U. S. 309 (1915). He stated that the doctrine is a,

> ". . . principal of comity and convenience (for in our opinion it is nothing more,) that calls for a resort to the local appellate tribunal before coming to the courts of the United States for a writ of habeas corpus" (237 U. S. at 348).

This principle is most recently reflected in two cases before the Second Circuit.* In both cases the Court found that Relator had an avenue of relief presently open to him within the state appellate system and in both cases the Court stated it would be "unseemly" for the district court to entertain the writ before the *available* higher state court remedies (including review by this Court) had been availed of.

Because of expanding and retroactive concepts of due process and equal protection, the courts of the nation led by the federal courts have widened the scope of post conviction collateral remedies. There can be no doubt that the initial responsibility to enforce the criminal law must lie with the states. But to harness a federal right to vindicate a federal wrong on the fortuitous factor of whether or not a state provides an added remedy is to partially immunize those states which evidence least concern for those rights. Regardless of motive, certainly no state is anxious to defend its criminal process in the federal courts and to so restrict access to the federal courts will obviously encourage technical limitations on the state's post conviction procedures.

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* *U.S. ex rel. Kling* v. *LaVallee*, 306 F. 2d 216 (1962) and *U.S. ex rel. Williams* v. *LaVallee*, 276 F. 2d 645, *cert. denied* 364 U.S. 922 (1960).

This is not to say that exhaustion of available state remedies play an insignificant role in federal habeas corpus procedure. Considerations of comity and orderly judicial administration preclude a state prisoner from a federal writ where there is still an opportunity to obtain redress within the state system primarily charged with the enforcement of the criminal law.

Nor may a defendant with complete impunity elect to by-pass the state appellate process in the hope of finding a more sympathetic forum in the federal courts. Doing so results in a forfeiture of all claims to reversible error of a non-federal nature* and also a waiver of all but the most elementary federal claims. The confusion which exists in this "untidy area of the law" lies not in the exhaustion rule, but the application of the doctrine of waiver which, if its exists, exists independently of the requirement of exhaustion of state remedies.

B. *Relator has not waived his right to be relieved of the penalties imposed under the judgment*

Two vital distinctions exist between the claim of Charles Noia and the claims of the Daniels' defendants in *Brown* v. *Allen*, 344 U. S. 443 (1953). The first is the nature of the claims and the other goes to the method of its proof.

The Daniels' claimed that they had been denied equal protection because members of their race had been excluded from the grand and petit jury.** There is a substantial distinction between a trial of a Negro with members

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* See, eg. *People* v. *Rizzo*, 246 N.Y. 334 (1927).

** A claim of coerced confession was also made but found completely unproven by the District Court. The dissenting justices in this Court and the dissenting judge in the Court of Appeals referred only to the jury exclusion question as having been proven.

of his race excluded from the panel and a trial where the only evidence is a coerced confession.

In the former situation it is possible for the jury to weigh the evidence and impartially decide the case. The right protected is a procedural one for if the array had included a representative number of Negroes but through chance or challenge the Daniels' wound up with the same all white jury there would be no denial of due process or equal protection.

On the other hand an involuntary confession is, in effect, irrebutably presumed to be false. III Wigmore, *Evidence*, §822 (3rd Ed. 1940); *Stein* v. *New York*, 346 U. S. 156, 192 (1953). The Noia jury thus had before it fraudulent evidence which led them to their verdict. This then is:

> "... one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding ..." (Frankfurter, *J.*, concurring opinion, *Brown* v. *Allen*, 344 U. S. at 503)

and to which the waiver doctrine does not apply

The second distinction, the method of proof of the claim, is one which goes to the heart of this litigation. The Daniels defendants came to the District Court with mere allegations of denial of due process and equal protection. Even *after a hearing* the claims were found without substance. It is apparent that their claims could not stand solely on the state trial record and at best could be made out only with the hearing. What the Daniels defendant waived by failure to timely appeal was not the right to attack imprisonment under a void judgment; rather they forfeited only the right to collaterally establish the invalidity or voidability of the judgment.

Here the involuntary nature of the confession and, it is claimed, consequent loss of jurisdiction by the trial court

appear affirmatively on the face of the record of the State proceeding and no extrinsic fact or evidence is relied upon.*

Unquestionably criminal jurisdiction to convict and imprison attached at common law where the trial court had jurisdiction over the defendant and over the subject matter and a showing of such jurisdiction upon the return of a writ of *habeas corpus ad subjiciendum* concluded a court from further enquiry. *Ex parte Watkins*, 3 Pet. 193 (1830); *Bushel's Case*, 6 Howell's State Trials 999 (1670). The very nature of the Writ demanded such a rule, for regardless of the "incorrectness" of a judgment of conviction detention thereunder would be "lawful." Only if the judgment were void could the resulting detention be unlawful. See, 1 Bailey, *Habeas Corpus* 79-94 (1913 ed.), 9 Halsbury's *Laws of England* 701-715 (2d ed.).

The liberalization of the writ from its common law strictures was effected by the 1867 statute and its successor 28 U. S. C. §2241 *et seq.* The writ which may lie under this statute reaches any detention which is in violation of the laws and Constitution of the United States, and gives the District Court the power to find facts beyond or in contradiction of those found by the State Courts.**

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* It has been stipulated between counsel herein that:

> "For purposes of this proceeding, the District Attorney of Kings County concedes that the coercive nature of the confession elicited from the respondent and introduced in evidence against him at the trial in Kings County Court was established and, therefore, the record of trial need not be printed."

** See, e.g., *Cranor* v. *Gonzales*, 226 F. 2d 83 (9th Cir., 1955), cert. denied, 350 U.S. 935 (1956); *U.S. ex rel Rogers* v. *Richmond*, 252 F. 2d 807 (2d Cir., 1958); cert. denied 357 U.S. 220 (1958); same, 271 F. 2d 364 (2d Cir. 1959), reversed on other grounds, 365 U.S. 534 (1961) *U.S. ex rel Alcaro* v. *Murphy*, 277 F. 2d 304 (2d Cir. 1960).

The statutes thus created a new class of judgments which could not support a lawful detention. Not only were void judgments insufficient, but the court now had the power to enquire into voidable judgments. The Daniels waiver applied to the latter type judgment and only went to the right of the defendant to require the district court to make new factual determinations upon which would rest the assertion of coercion and invalidity. The Daniels waiver did not touch upon the situation where the facts were undisputed and where the relator relied exclusively on the State record as the proof of its own nullity.

That such a distinction is a meaningful one was acknowledged by a unanimous Court in *Bowen* v. *Johnston*, 306 U. S. 19 (1939). In that case the defendant had been convicted in the district court of murder within a national park. He did not appeal the conviction but four years later sought habeas corpus on the grounds that the State of Georgia had exclusive jurisdiction over the crime.

In a carefully worded opinion Chief Justice Hughes, after noting the general rule that habeas corpus will not supplant a writ of error to review an erroneous factual determination of the trial court's jurisdiction, proceeded to rule that where the absence of jurisdiction as a matter of law appears on the face of the record the remedy of habeas corpus may be needed to release the prisoner from punishment imposed by a court manifestly without jurisdiction and that such remedy is not barred by the initial failure to appeal.

Thus where on the face of the record there is a controverted issue regarding the basic jurisdictional facts relator can rightly be held to the ordinary appellate procedure provided by the State. A possible reason for such a rule is that the State's method of reviewing factual issues is as

much a part of determining the facts as is the initial finding of a trial court: Cf. *Frank* v. *Mangum*, *supra*, at 335.

Under *Brown* v. *Allen*, *supra*, at page 506 where the federal habeas corpus judge is directed to give "great weight" to a state court factual determination it is necessary that the defendant afford the state an opportunity to finalize its finding. In instances where factual determinations are subject to appellate review a trial court's finding may be reinforced or modified upon appeal thereby completing the state court adjudication of the fact. See N. Y. Code of Criminal Procedure, §543. No such consideration is involved where the jurisdictional question is a naked question of law (i.e. where the basic facts are undisputed and all that remains is to interpret them). In this instance the State has exhausted its power to enlarge or detract from the basic elements which will sustain or defeat its jurisdiction. Likewise the principle contended for has no application where the judgment is merely voidable for error of law not going to the trial court's jurisdiction. In such instances the judgment is conclusive until reversed and habeas corpus will not lie. *Sunal* v. *Large*, 332 U. S. 174 (1947), reversing Judge Learned Hand's determination in *U. S. ex rel. Kulick* v. *Kennedy*, 157 F. 2d 811 (2d Cir., 1947) that habeas corpus would lie for a non-jurisdictional error.

The power to enquire into jurisdiction is not solely limited to the initial jurisdiction of a court to hear a criminal case. Lack of jurisdiction is no less great when the court loses jurisdiction during the course of the proceeding and thus has no power to render judgment. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

In his opinion, dissenting from the denial of a petition for reargument, Mr. Justice Frankfurter characterized

Johnson v. *Zerbst* as a "trail blazing decision" because it, in a fundamental way, restates the common law principles of habeas corpus and brings it into harmony with the statutory writ and modern concepts of fair dealing in criminal cases. *Burns* v. *Wilson*, 346 U. S. 844 (1953).

Historically the power of the court to pronounce judgment rested upon the court's initial authority to assume jurisdiction. The early state habeas corpus cases indicate the federal court's difficulty in reconciling this principle with the broad statutory writ and the expanding concepts of due process and equal protection of law.

Johnson v. *Zerbst*, although by no means without precedent, returned habeas corpus to its proper function but retained within its scope claims of federally protected rights denied during trial. It did this by holding that the denial of a fundamental right in the course of trial stripped the trial court of jurisdiction to proceed to judgment. Although *Johnson* v. *Zerbst* involved the denial to a federal defendant his rights under the Sixth Amendment, the holding is equally applicable to a claim of denial of rights under the Fourteenth Amendment in the course of a state prosecution as Circuit Judge Moore recently stated in *U. S. ex rel. Williams* v. *LaVallee*, *supra*:

> "The allegations here [of coerced confession used to obtain conviction] affect the fundamental jurisdiction of the court in the sense of the principles set forth in *Johnson* v. *Zerbst* . . ."

The notion that the denial of a fundamental right in the course of a state trial results in the loss of "particular" jurisdiction (Holmes, *J.*, dissenting in *Frank* v. *Mangum*, *supra*) is not only consistent with the history of the common law and statutory writ, but conceptually is required by the nature of the proceeding which can lie only if the

detention is unlawful. Cf. *Stein* v. *New York*, *supra*, at 192. Compare, Restatement, *Judgments*, §4, Comment a.

Inasmuch as it is claimed herein that the confession of relator was coerced as a matter of law, the resulting judgment is void and may not be interposed by the State as a defense to a civil action of habeas corpus.

In this context the distinction between *Daniels* v. *Allen*, *supra*, and Noia's case is crucial. The Daniels defendants were seeking the right to *establish* the facts to support their claim while Noia comes to the federal court with established and concealed facts which can lead only to the conclusion that his confession was involuntary.

The uniform rulings of the Supreme Court have held that absence of jurisdiction, established as a matter of law on the trial record, becomes a part of the judgment and renders it always subject to collateral attack: *In re Snow*, 120 U. S. 274 (1887); *Nielsen, Petitioner*, 131 U. S. 176 (1889).

In both cases the *defense* of former jeopardy had been established as a matter of law on the facts before the trial court. In both cases the trial judge erroneously decided the question. Neither defendant appealed but sought release by way of habeas corpus. In the *Nielsen* case the Solicitor General argued:

> "If the judgment of the Court . . . was wrong, it was an error, but the error was one of judgment. The judgment might be voidable for error, but was not void for want of power, and, until reversed was conclusive. The writ of habeas corpus should not be converted into a mere writ of error" (131 U. S. at 179).

In both cases the writ was sustained even though the constitutional violation did not go to the jurisdiction *strictí juris* of the trial court.

C. *The Doctrine of "Adequate and Independent State Grounds" has no applicability to habeas corpus proceedings*

The decision of this Court in *Murdock* v. *City of Memphis*, 87 U. S. (20 Wall.) 590 (1875) sets forth the doctrine of "adequate and independent state grounds" as a bar to federal review of state court decisions.

Prior to the dissenting opinions in *Irvin* v. *Dowd*, 359 U. S. 394, 407, 412 (1959) there appears to be no opinion by this Court which would extend the *Murdock* v. *Memphis* rule limiting direct appellate review to the independent habeas corpus proceeding.

Reduced to its most elementary terms *Murdock* holds that where a decision of the highest state court rests upon an independent and adequate non-federal ground this Court will not review the federal questions also in the case whether they were passed upon by the state court or not. The rationale for the doctrine is simply that no matter how this Court would decide the federal question the remittance of the case back to the state would not affect the ultimate disposition of the case for the state court would merely reiterate its local ground for decision.

In this litigation between Charles Noia and the Warden of Greenhaven Prison we do not ask the federal courts to review the correctness of Judge Fuld's decision which held coram nobis to be unavailable under New York law. Coming from New York's highest court, the decision is automatically correct as a statement of New York law. *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938).

Relator seeks only to litigate the question of whether his detention by the Warden is, in the statutory language, "in violation of the Constitution or laws or treaties of the United States." The judgment upon which the detention is

based is void, *Brown* v. *Mississippi*, 297 U. S. 278, 286-287 (1936); *Blackburn* v. *Alabama*, 361 U. S. 199, 210-211 (1960) and the continued detention is a continuing violation of Charles Noia's rights under the Federal Constitution.

If *this* federal question is resolved in Relator's favor then he will be released, regardless of the correctness of *People* v. *Noia*, as a statement of New York law. See, *Mattox* v. *Sacks*, 369 U. S. 656 (1962).

Even if the kind of adequate state ground we are here concerned with is not precisely the same as the *Murdock* doctrine but rather merely something akin to it, it does not apply as an absolute bar. Every case in this Court from *Ex parte Royall*, *supra*, through *Frisbie* v. *Collins*, 342 U. S. 519 (1952) indicates that any federal court may issue the Writ even prior to state trial and/or appeal. Comity and orderly administration of justice demand that such power be exercised sparingly however if the federal court has the *power* to issue the writ prior even the state's opportunity to formulate a state ground, certainly it must follow that no state ground would be a bar.

Quite clearly Congress has not intended there to be a bar. Inasmuch as the 1867 statute was passed prior to *Murdock* obviously the doctrine of adequate state grounds played no part in the creation of the remedy. If anything the intention of Congress would have been exactly to the contrary for the original habeas corpus act was intended in large part to prevent the Southern States from thwarting post-Civil War legislation by judicial action. More settled conditions and judicial respect for the state court process tempered the blanket grant of power and gradually the doctrine of exhaustion of available state remedies evolved.

When Congress was called upon to codify and revise the law of habeas corpus in 1948 it did not choose to engraft

"adequate state grounds" into the statute. It passed only one limitation upon the power of the federal court "to hear and dispose of the matter as law and justice require," and that was the requirement of exhaustion of available remedies.

In the face of the near hundred years existence of the modern Great Writ without such limitation and the failure of Congress to include such a limitation in the general revision of 1948, the wisdom of now adding one more procedural hurdle to prevent consideration of a valid claim is open to serious question.

POINT II

Brown (Daniels) v. Allen, to the extent that it imports a forfeiture of basic constitutional claims, should be overruled.

If the decision of this Court in *Daniels* v. *Allen* is found to be as inflexible as urged by Petitioner herein, it is respectfully suggested that the Court reconsider the wisdom and serviceability of a rule which can have meaningful effect only when applied as an absolute bar to legitimate constitutional claims.

Meritless claims, insofar as their ultimate disposition is concerned, are unaffected by any rule which prevents consideration because of procedural default or inadvertance. It is only in the area of those fortunately few cases of grievous and fundamental deprivation of constitutional right that, as contended by Petitioner, a prisoner's procedural lapse should stand as a bar to the consideration of substantive claims. The Great Writ, standing as a remedy for those rare instances of fundamental error is thus to be restricted still further to even fewer cases contemplated

by the statute's direction to dispose of the matter as law and justice require.

Compelling reasons demand federal relief to be available. Aside from the benefit to the particular relators involved, the habeas corpus act seeks to impose upon the states uniform minimal standards of justice under the Fourteenth Amendment. The concept which would deny relief to Noia because New York will not now consider his claim but grant federal belief if they would, is one which penalizes those states which, in the interests of justice, provide expanded remedies to raise claims under the Federal Constitution. As noted by the District Court below this concept immunizes from review the decision of those states whose judges walk the narrow path of state procedural grounds.

Thus the reach of the federal Writ to inquire into substantive injustice is to be limited by state procedural rules which perpetuate the initial violation of federal right.

In *U. S. ex rel. Kulick* v. *Kennedy, supra*, the late Judge Learned Hand held out habeas corpus to be available to correct manifest injustice when all else had failed. In reversing *(sub nom. Sunal* v. *Large, supra)* this Court specifically noted the error involved did not go to a basic constitutional right and left open the writ's availability in such cases.

Unquestionably failure to take advantage of a remedy once provided by the state is a factor to be considered before the issuance of the federal writ. But it should only be dispositive of the application where reason and justice demand such a result. This Court's decision in *Ex parte Spencer*, 228 U. S. 652 (1913) is an outstanding example of a situation where a state prisoner's volitional failure to appeal should prevent a federal court from entertaining a writ. Spencer was convicted of crime in Pennsylvania

and was sentenced under a statute which imposed imprisonment for a minimum of eighteen months and a maximum of two years. At the time the crime was committed the statute provided for imprisonment of not exceeding two years with a mandatory minimum sentence of only six months. Instead of appealing, Spencer immediately sued out a writ in federal court claiming his right to immediate release on the ground that the application of the statute was *ex post facto* and therefore unconstitutional.

In affirming the denial of the writ this Court held that in by-passing the state appellate system the defendant had prevented the state court from interpreting the amendment as a parole statute, an interpretation which if made in good faith would be binding on the federal courts and would save the statute from the claim of unconstitutionality; further the Pennsylvania appellate court, if holding the applicability *ex post facto* had the power to modify the judgment so as to impose the original six month mandatory minimum sentence upon the defendant whereas the federal court only had the power to order the prisoner's release.

Therefore by his deliberate act of not appealing, Spencer sought to prevent the State of Pennsylvania from rendering a decision which would have validated the judgment and overcome any objection to the conviction.

If the State of New York could have properly done anything other than reverse Charles Noia's conviction because of the coerced confession and the absence of any lawful evidence Petitioners could properly assert the position of the State had been prejudiced by the failure to appeal.

The position of the Petitioner in this case however is that Noia *had* to appeal in order that New York might first vacate the conviction or improperly affirm the judgment. Because he did not give New York the opportunity to be wrong, as it was with co-defendants Caminito and Bonino,

or because he did not give it the opportunity to be right, which would have saved him eighteen years in prison, he must serve the remaining years of his life in jail.*

Certainly the State of New York with immediate responsibility for the administration of the criminal law may lay down reasonable rules governing the procedure in its courts. With equal certainty federal courts should defer to those rules—but the deference is one that should flow from respect and confidence that the state will see that fundamental justice is done. When it is apparent that justice—in the form of observance of constitutional guarantees—has not been done the federal court should exercise its ultimate responsibility of enforcing the Constitution. See, *U. S. ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71 (5th Cir., 1959); *Bailey* v. *Hoosier*, 287 F. 2d 936 (8th Cir.) *cert. denied*, 368 U. S. 877 (1961); *Petition of Carmen*, 165 F. Supp. 942 (N. D. Cal.) aff'd 270 F. 2d 869 (9th Cir.) *cert. denied*, 361 U. S. 934 (1960).

The simple ultimate question on this appeal is whether Charles Noia must spend the rest of his life in jail on a conviction which all men now acknowledge was fundamentally wrong. If Noia was "wrong" in not appealing it is a strange brand of justice which equates this error in judgment with the initial deliberate wrong done by the State of New York. The eighteen years in prison have amply reimbursed the Sovereignty of the State of New York for any procedural lapse and New York's demand for further payment should be rejected.

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* Under a recent statute he will be eligible for parole after having served thirty years in prison. Executive clemency is apparently unavailable because of the outstanding indictments against the co-defendants who apparently are not disposed to change the *status quo* by moving for a speedy trial and or dismissal of the indictment.

Below the Court of Appeals held this case, with its peculiar and compelling fact situation, to fall within recognized exceptions to the general rules it found applicable. The Petitioner claims that the judgment exercised by the majority was improper; based solely on compassion and justice and ignoring the legal principles involved. What the Petitioner overlooks is that the principles involved are judge-made law and like all such law is designed to ultimately serve the ends of justice. That there should be exceptions to the general rules is consistent with our common law tradition and with the Fourteenth Amendment power and the statutory grant to all United States judges and justices to issue the writ and dispose of the matter as law and justice require.

Conclusion

The order of the Court of Appeals for the Second Circuit should be affirmed and the writ of habeas corpus sustained.

New York, New York
November, 1962

Respectfully submitted,

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(1291)

IN THE

Supreme Court of the United States

No. 84—October Term, 1962

EDWIN M. FAY, as Warden of Greenhaven Prison, State of New York, and THE PEOPLE OF THE STATE OF NEW YORK,

Petitioners,

against

CHARLES NOIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ATTORNEY GENERAL OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

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BATAVIA, N. Y.

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against

CHARLES NOIA,

Respondent.

BRIEF OF ATTORNEY GENERAL OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF REVERSAL

Statement

Noia's right to *habeas corpus* is barred by each of three rules of Federal review: (1) he cannot seek to have his conviction set aside on the ground that his constitutional rights were violated at the trial because he has intentionally waived his right to further assert that claim; (2) he has failed to exhaust his state remedies within the meaning of 28 U. S. C. § 2254; and (3) there is an independent and adequate state ground which sustains his conviction.

Reported below: 300 F. 2d 345; certiorari granted, 369 U. S. 869.

POINT I

The record clearly discloses that Noia knowingly and voluntarily chose not to appeal his judgment of conviction. He has, therefore, waived his right to attack that judgment by a Federal *habeas corpus* proceeding.

The Court below has noted that some Federal constitutional rights may be waived at the trial (citing *Adams* v. *United States ex rel. McCann*, 317 U. S. 269 [1942]), or by a conscious and willing failure to appeal (citing *Brown* v. *Allen*, 344 U. S. 443, 503 [1953]).

At his trial, Noia properly and fully asserted his right under the Fourteenth Amendment to exclude a confession that was allegedly coerced. The verdict of the jury, however, was that his confession in fact was uncoerced. Notwithstanding Noia's failure to review that determination by prosecuting an appeal, the Court below has held that he did not waive his right to attack, by a Federal writ of *habeas corpus*, the judgment of conviction. It found that his failure to appeal was not "conscious and willing" because (1) "it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment" (R. 75) and (2) because he did not know then "what he knows now" (R. 76), *i.e.*, that even if the state appeal were unsuccessful, he might ultimately obtain his freedom, rather than face a second trial and the possibility of a death sentence.

We submit that this constitutes a speculative and wholly improper basis for the determination that Noia's failure to appeal was not conscious and willing and that, although the District Court made no finding of fact with respect to the question of waiver, the record clearly establishes the

exercise of a conscious, intelligent and voluntary decision on Noia's part not to appeal.

Following the *habeas corpus* hearing which was held "for the limited purpose of a hearing on the circumstances surrounding the relator's failure to appeal the conviction in the first instance" (R. 62) the District Court found:

> "Relator's trial counsel testified that he had advised relator of his rights to appeal. The relator did not at all deny that he knew of his rights to appeal. He, however, testified that he did not appeal because he had no funds to retain an attorney to prosecute the appeal and did not wish to put his family further into debt. However commendable * * * this motive for not appealing might be, it does not aid the relator."

And, in a footnote, the District Court added (R. 64):

> "I might note, in passing, that absolutely no evidence of the indigency of relator's family was adduced at the trial, except the relator's conclusory statement, despite the fact that there were several spectators at the hearing who were presumably relatives of the relator. In addition, absolutely no explanation was offered by relator for his failure to proceed to adduce any such evidence of indigency."

The rationale, moreover, of the determination by the Court below that Noia's failure to appeal was not "conscious and willing" is patently unsound. Should that thesis be adopted as a general rule, then no defendant in any criminal proceeding could be said to have made a conscious and willing failure to appeal—unless it could be shown that he knew in advance the appellate process would ultimately secure his freedom and that he nevertheless declined to set such procedure in motion.

The Court below, we submit, has clearly given a tortured application to the meaning of a knowing failure to appeal.

POINT II

The requirements of Title 28, § 2254, United States Code, which mandate an exhaustion of State remedies as a condition precedent to invocation of Federal jurisdiction, bar the respondent from obtaining a Federal writ of *habeas corpus*.

We submit that Noia's failure to appeal from his judgment of conviction precludes him from Federal *habeas corpus* relief because of the exhaustion requirements of 28 U. S. C. § 2254.

The Court below, however, has held that, notwithstanding his "past failure to utilize a particular state remedy, Noia would still go free, if his case is sufficiently exceptional" (R. 85), citing *Darr* v. *Burford*, 339 U. S. 200 (1950), and *Frisbie* v. *Collins*, 342 U. S. 519 (1952).

The question in *Darr* v. *Burford*, *supra*, related only to whether, under exceptional circumstances, one might disregard the customary procedure of petitioning for certiorari, this Court noting the issue of Petitioner's failure to appeal "is not before us" (R. 203).

Although this Court, in *Frisbie* v. *Collins*, *supra*, held that the general rule with respect to the denial of *habeas corpus* by Federal Courts to State prisoners if there is available State corrective process "is not rigid and inflexible," it also noted that the State of Michigan failed to discuss the availability of State relief until *after* the Court of Appeals had held the prisoner was entitled to a hearing. Moreover, the exceptional circumstances relied upon by the Court of Appeals involved the forcible abduction and kidnapping by State officers, of persons charged with crimes, from other states, without warrant or extradition, into the

State of Michigan for trial. Certainly, no such element is present here, and as this Court noted the circumstances in the *Frisbie* case, at p. 522, "are peculiar to this case, may never come up again, and a discussion of them could not give precision to the 'special circumstances' rule."

We suggest the proper interpretation of the requirements of 28 U. S. C. § 2254 is found in the dissenting opinion of Judge MOORE, to wit (R. 106):

> "The decision of the Supreme Court in *Daniels v. Allen*, decided *sub nom. Brown v. Allen*, 344 U. S. 443, 1953, clearly controls the issues in this case and requires affirmance of the dismissal of the writ."

POINT III

The presence of an independent and adequate state ground for the decision supporting Noia's detention precludes Federal *habeas corpus* relief.

A state court decision based upon a non-federal ground has been held to be adequate: (1) if it is broad enough, without reference to the federal question, to sustain the state court judgment; (2) if it is independent of the federal question; and (3) if it is tenable rather than arbitrary. *Murdock v. City of Memphis*, 20 Wall. 590, 636 (1874); *Eustis v. Bolles*, 150 U. S. 361, 370 (1893); *Enterprise Irrigation District v. Farmers' Mutual Canal Company*, 243 U. S. 157, 164 (1917); *Postal Telegraph Cable Co. v. City of Newport*, 247 U. S. 464, 475-6 (1918); *Ward v. Board of County Commissioners*, 253 U. S. 17, 22 (1920); *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276, 282 (1932).

While the Court below has held that the state ground in this case clearly satisfies all of these requirements, it

has concluded (R. 91) that such ground is nevertheless inadequate.

The obvious rationale of this conclusion is that it is unreasonable here for the State to require the respondent to appeal. "* * * a simple failure to appeal, reasonable enough to prevent federal judicial intervention in most cases, is in this particular case unreasonable and inadequate [because] it still does not sit well on the consciences of civilized men that a man should spend the rest of his life in confinement when it is patent to all that the only reason for his detention is that he did not timely appeal his conviction" (R. 95). But, as Judge MOORE has noted in his dissenting opinion (at R. 106-109) such thesis was specifically *rejected* by this Court in both *Brown* v. *Allen*, 344 U. S. 443 (1953), *supra*, and in *Michel* v. *Louisiana*, 350 U. S. 91 (1955), when it refused to pass upon constitutional claims because of failure to comply with State procedure, despite the fact that the appellants, in both cases, were under *sentence of death*.

In view of the fact that the District Court has found no excuse by the respondent for his failure to appeal, we submit that such failure should be considered adequate to preclude federal review of his claim.

Perhaps the best solution to the problem presented here is indicated in *People* v. *Rizzo*, 246 N. Y. 334 (1927) cited by the Court below. In the *Rizzo* case, *supra*, only one of four co-defendants appealed from the judgment of conviction. The New York Court of Appeals held:

> "A very strange situation has arisen in this case. I called attention to the four defendants who were convicted of this crime of an attempt to commit robbery in the first degree. They were all tried together upon the same evidence, and jointly convicted, and all sentenced to State's prison for varying terms. Rizzo

was the only one of the four to appeal * * * and we have now held that he was not guilty of the crime charged. If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the court; their judgments stand, and they must serve their sentences. This of course is a situation which must in all fairness be met in some way. We, therefore, suggest to the district attorney of Bronx county that he bring the cases of these three men to attention of the Governor to be dealt with as to him seems proper in the light of this opinion" (pp. 339-340).

CONCLUSION

The order of the Court of Appeals should be reversed and that of the District Court should be affirmed.

Albany, New York,
November 26, 1962.

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